

FILED

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DEC - 8 1981

H. STUART CUNNINGHAM, CLERK
UNITED STATES DISTRICT COURT

ATARI, INC., et al.,

Plaintiffs,

vs.

DOCKETED

No. 81 C. 19814

81C 6434

NORTH AMERICAN PHILLIPS CONSUMER)
ELECTRONICS CORP., et al.,

Defendants.

812220

Before the HONORABLE GEORGE N. LEIGHTON

Monday, November 30, 1981

9:00 a.m.

PRESENT:

MR. DANIEL VITTUM,
MR. MARTIN L. LAGOD,
MR. ROBERT KRUPKA,

for the Plaintiff Atari, Inc.

MR. ERIC COHEN,

for the Plaintiff Midway Mfg. Co.

MR. THEODORE W. ANDERSON.

MR. JAMES T. WILLIAMS,

MR. GREGORY B. BEGGS,

for the defendants.

USCA 7th Circuit
FILED

DEC 22 1981

THOMAS F. STANCOE
CLERK

Clerk's File Copy

27

1 MR. VITTUM: Good morning, your Honor.

2 MR. ANDERSON: Good morning, your Honor.

3 THE COURT: Good morning. You may proceed with your
4 next witness.

5 MR. ANDERSON: Thank you, your Honor.

6 On Wednesday, as the Court knows, the plaintiff
7 called three witnesses and we called Mr. Kunkel, the President,
8 the Associate Editor of the magazine, Electronic Games.

9 We will call Mr. Ed Averett, who is the designer
10 and creator of the game, K. C. Munchkin, as our next witness,
11 followed by Mr. Ralph Staup who is in charge of the K. C.
12 Munchkin and the Odyssey program at the defendant company,
13 and finally, Mr. Ron Giese on the local practices of merchan-
14 dising and advertising.

15 At this time I would like to mark the console or
16 the Pac-Man arcade game as Defendants' Exhibit 14 and offer
17 it in evidence. It was purchased by our firm on November
18 the 20th, two days after this lawsuit was filed and retained
19 by us until we brought it to Court here for use in this case.

20 MR. VITTUM: There is no objection, Judge. I would just
21 note that that console is also Plaintiffs' Exhibit 16 in
22 evidence.

23 We also had a Pac-Man game available at the court-
24 house on Friday but found no point in having two of the
25 same marked.

1 THE COURT: All right.

2 MR. ANDERSON: And your Honor, if I may just state
3 again as we start this morning, as I see the fundamental
4 issue here, it is the question of the scope of a copyright
5 and what it can cover, whether it can cover concepts or
6 ideas.

7 If I may, I would like to just hand up a copy of
8 Durham Industries vs. Comy, reported at 630, F. 2d 905,
9 a Second Circuit 1980 case which we cite in our proposed
10 findings and conclusions which I think is extremely instruc-
11 tive and helpful on the subject.

12 THE COURT: All right.

13 MR. ANDERSON: Do we have a copy of the exhibit or
14 you probably have it.

15 MR. VITTUM: Do you have a copy?

16 MR. BEGGS: No, I don't have an extra copy.

17 MR. ANDERSON: We have highlighted certain portions
18 starting at Page 914.

19 THE COURT: All right.

20 MR. ANDERSON: I would like to call Mr. Ed Averett,
21 please.

22 EDWARD BAUGH AVERETT, III,
23 called as a witness by the defendants, having been first
24 duly sworn, was examined and testified as follows:

25 THE CLERK: Be seated, please, state your full

1 name, spell your last name. Lean forward and speak
2 directly to that microphone. Keep your voice up.

3 THE WITNESS: My name is Ed, Edward Baugh Averett III,
4 A-v-e-r-e-t-t. I am 33 years old.

DIRECT EXAMINATION

BY MR. ANDERSON:

7 Q Where do you reside, Mr. Averett?

8 A Chattanooga, Tennessee.

9 Q What is your occupation?

10 A I am a programmer who designs and develops games
11 for the consumer game industry.

12 Q Describe what you do at the present time in that
13 capacity.

14 A I come up with ideas, implement them in programming
15 language, take them to Magnavox. Magnavox, if they like them,
16 manufactures them and pays my group a royalty, which consists
17 of my wife and myself.

18 Q Your wife and yourself?

19 A Yes.

20 Q What is your wife's name?

21 A My wife's name is Linda.

22 Q When did you and Linda start in this occupation?

23 A I started in 1977, April 1st, developing software
24 with the intent of designing games using animation for
25 entertainment purposes.

1 My wife joined me approximately two years later
2 when we were profitable. or a little bit of difficulty.

3 Q Will you briefly outline your education since
4 high school. or you just briefly describe your various titles

5 A Yes. I graduated from the University of Tennessee
6 with a BS and an MS in Electrical Engineering, specializing
7 in Electronics and computers. or support for the main-

8 computer I joined the army after college, graduated from
9 Officer's Candidate School as a Second Lieutenant, was
10 assigned to the Ft. Monmouth Advanced Development for Computers
11 and Electronics Lab in Ft. Monmouth, New Jersey, worked there
12 for two years, was discharged and went to California to begin
13 working for Intel Corporation just after the microprocessor
14 or microcomputer chip was introduced by them. or a special

15 Q Will you briefly describe your wife's educational
16 background? or background. She never incorporated it in degree.

17 A Yes. She is an Engineer also with a Degree in
18 Engineering Physics. She has worked in computer software all
19 her professional life, which is approximately 12 years. She
20 has worked in operating systems. Her previous job was seven
21 years with Hewlett-Packard Corporation in the scientific
22 minicomputer area where she was responsible for all the
23 software for that machine. The machine number is the HP 1000.
24 That includes operating systems, languages, data bases, all
25 facets of minicomputer software. or.

1 Q You might speak just a little bit slower. You
2 may be giving the reporter a little bit of difficulty.

3 A I am sorry. Last year after I left, I couldn't do

4 what Q Will you just briefly describe your various titles
5 and responsibilities at Intel? and get to be a year later as

6 A Yes. I was in the Marketing Department and I was
7 responsible for marketing sales and support for the micro-
8 computer area. action and game concepts as that for a year

9 before In that area, we were looking for new markets for
10 this new product as it came out and one of the areas that
11 I became convinced was a large potential for microcomputers
12 was the consumer market. The best approach to entering that
13 market appeared to me was through entertainment or graphics,
14 graphic computer or games and so, we developed a special
15 chip that is used in Odyssey 2 while I was at Intel and then
16 we sold it to Magnavox. Magnavox incorporated it in Odyssey 2.

17 That was my entre into the Odyssey 2 program. I was
18 imminently familiar with that system. did you have for this

19 Q When you refer to Magnavox, are you referring to
20 North American Phillips Consumer Electronics Corporation?

21 A Yes, I am. a special purpose computer system

22 Q As it is now known? top software as a particular

23 A Yes, I am.

24 Q When did you leave Intel? When you left

25 A I left Intel April 1, 1977.

1 Q Will you describe your activities after leaving
2 Intel?

3 A Well, the first year after I left, I couldn't do
4 what I wanted to do, which was to develop software on
5 Odyssey 2 because the chip turned out to be a year late as
6 all chips seem to.

7 I consequently bought an arcade system and practiced
8 developing animation and game concepts on that for a year
9 before the Odyssey 2 finally came on the market. After it
10 came on the market, I met with Magnavox or met Mike Staup
11 of Magnavox, actually, at a consumer show in January of 1978
12 and approached him with the idea of developing software for
13 his products and with the -- under the understanding that I
14 had all the hardware and that he would have nothing at risk
15 since I knew the system pretty well and if he liked what he
16 saw he will pay me a royalty and if he didn't he could tell
17 me to go back home.

18 Q What equipment or facilities did you have for this
19 work that you were doing at that time?

20 A Well, it takes what we call in the trade a develop-
21 ment system which is a special purpose computer system
22 specifically designed to develop software on a particular
23 microprocessor.

24 Q After meeting with Mr. Mike Staup, what happened
25 next?

1 A Well, Mike liked the idea of the no risk approach
2 to software for him and I liked the potential that I saw in
3 the market and so he said, "Go ahead."

4 I subsequently went back and developed the game
5 Take the Money and Run which I believe was the first ever
6 chase and be chased rig game in the industry, either arcade
7 or consumer.

8 Q What became of Take the Money and Run?

9 A Well, we took it -- I took it back to Magnavox.
10 They liked it. They manufactured it and it has been in
11 production since the spring or, actually, it was the late
12 winter, I believe, the February time frame in 1978.

13 Q I will have marked as Defendants' Exhibit 15, an
14 Odyssey 2 game cartridge for Take the Money and Run.

15 BY MR. AVERETT: I hand you Defendants' Exhibit 15, Mr. Averett.
16 Is that your cartridge for playing the game Take the Money
17 and Run?

18 A Yes, it is.

19 Q Can you place it in the Odyssey 2 console and show
20 just how it works and what display it gives, please.

21 MR. VITTUM: Your Honor, I think at this point I
22 would like to raise an objection. It is the same
23 objection that was made during the examination --

24 THE COURT: What is the purpose of this? This
25 is an entirely different game. What is the relevancy

1 of that game to these two that we are looking at?

2 MR. ANDERSON: Your Honor, it has at least two
3 significant points of relevancy. One, it shows
4 Mr. Averett's skill and background and what he did in
5 1978 long before Pac-Man.

6 Second, it shows that these concepts, the
7 ideas that are all available to everyone, were known,
8 were being used, and that is very important on this
9 question of the scope of the copyright.

10 THE COURT: All right. The objection will be
11 overruled. Go ahead.

12 MR. ANDERSON: Your Honor, I don't know if you had
13 a chance to look at the game.

14 THE COURT: I can see it from here.

15 BY MR. ANDERSON:

16 Q To go back to the select --

17 MR. VITUM: Excuse me, your Honor. May we step
18 up and watch the game?

19 THE COURT: Surely.

20 BY MR. ANDERSON:

21 Q Now you have placed the cartridge in the Odyssey
22 console, is that correct, Mr. Averett?

23 A Yes, that is correct.

24 Q And in the Odyssey system, when you place the
25 cartridge in the console, can you explain just what happens?

1 A Well, you engage -- when you place the cartridge in,
2 you engage T and it engages the program. Now the cartridge
3 is really the keyboard looking for the consumer's input to
4 what he is going to play and how he is going to play it.

5 Q Now displayed on the screen are the words, "Select
6 game" in multiple colors. Can you explain what the colors
7 are, what the significance of that is in the Odyssey system?

8 A Well, one of the significances is, in the Odyssey
9 system we only have seven colors to work with. One of the
10 purposes of using it in this format is to adjust your set
11 so you are sure you have the correct color combination and
12 the right hue on each color.

13 This is a green-yellow-blue-purple, cyano-white
14 and then the black background and that is basically what we
15 have to work with.

16 Q And the G is red?

17 A Yes, red.

18 Q So there are seven colors and the black background.
19 Is that true in all the Odyssey programming that you have done?

20 A Yes. It is a function of the console.

21 Q All right. Then if you will -- is that true in
22 K. C. Munchkin as well?

23 A Oh, yes.

24 Q There are just seven colors available?

25 A Yes.

1 Q Would you go ahead and just briefly describe and
2 show the game, Take the Money and Run, that you came out with
3 in 1978. THE COURT: All right, go ahead.

4 A As I said, this is a maze chase and be-chased game
5 in certain situations. The player controls the little guys
6 on the side, the animated little men on the side, the blue
7 and green large characters. Their purpose in this game is
8 to run down through the grid, these fellows under a positive
9 condition which came up here (indicating).

10 Now this is a negative condition in this situation.
11 The computer controlled players will chase down the players
12 and so the objective is to try to stay away and avoid them as
13 long as possible.

14 When you are caught, the number of points that are
15 left in there are subtracted from the total. That one is
16 about to be caught. I am out of play right now. This fellow
17 got out of the play then.

18 It is a chase and be-chased and then it is a function
19 of how long you have avoided or how quickly you have captured
20 the computer controlled people as to how many points you get.

21 MR. ANDERSON: Thank you.

22 THE COURT: Let me ask a question. Is what is
23 being shown on that screen called the maze?

24 THE WITNESS: Yes.

25 THE COURT: That is what is called the maze?

1 THE WITNESS: This is what I guess -- what I would
2 always call the maze. did you first learn of the maze.

3 THE COURT: And that seems to be common in all of
4 these video games. All these video games have this
5 characteristic of the maze or something like a maze?

6 THE WITNESS: Not necessarily. Any maze game does
7 but you can have very good games.

8 THE COURT: Take the ones we have here. Let us
9 limit ourselves -- I am only interested in Pac-Man and
10 K. C. Munchkin and games like those two. They all have
11 the common characteristics of a maze?

12 THE WITNESS: Yes, sir. in my opinion, the games

13 THE COURT: All right. That is what I wanted to
14 know. All right. Let us go ahead. type of game will

15 MR. ANDERSON: Your Honor, I have the official game
16 rules for Take the Money and Run which I will mark as
17 Defendants' Exhibit 16 and hand it up to the Court.

18 THE COURT: All right. do you have Pac-Man.

19 MR. ANDERSON: Which does, I think, refer to and
20 show the maze. in February of last year, 1988 -- no, 1987,

21 THE COURT: All right. Anything else from this
22 witness at that position?

23 MR. ANDERSON: Thank you, your Honor. Thank you,
24 Mr. Averett. I am what you and the State read of 113 at

25 THE COURT: You may resume the stand.

1 BY MR. ANDERSON: I recall my reaction was that somebody

2 Q Mr. Averett, how did you first learn of the game,
3 the arcade game, called Pac-Man?

4 A Mike Allory returned from a trip -- mental spacing

5 Q That is Mike Staup? at that time and that's

6 A Mike Staup, yes. He's a real distribution man, whereas

7 Q S-t-a-u-p? Can you get points for achieving an

8 A S-t-a-u-p and as normal, when we are in a layover

9 situation in an airport, we go down the arcades and look to

10 see what new ideas, new concepts are available and how they

11 are being received by the public. Here, the other place

12 In our opinion -- at least in my opinion, the games

13 industry is a lot like movies or a lot like records. It has

14 trends, it has drifts of ideas where one type of game will

15 be very popular and then it will wane and another type of game

16 will come in and it will be popular. And so we were looking

17 to see what the drift was. In on another game at the time and

18 At that point in time we saw Pac-Man. And what

19 Q When was that, approximately? particular project.

20 A That was in February of last year, 1980 -- no, 1981,

21 I guess. direction he wants to go in next. So we really

22 Q February of 1981? talk about it. I kind of put it

23 A Yes. my hand and looked at it in terms of what

24 Q And tell me what you and Mike Staup said or did at

25 that time? What was your reaction? popular year on the one

1 A Well as I recall, my reaction was that somebody
2 finally picked up on the concept of Take the Money and Run.
3 I wasn't too impressed with Pac-Man, to show some of my
4 ignorance. I didn't perceive that the incremental scoring
5 was that significant of a concept at that time and that's
6 what I really see is Pac-Man's real contribution here, whereas,
7 in Take the Money and Run, you get points for achieving an
8 objective. It is not a concrete objective like eating a dot
9 which Pac-Man did bring and, it brought it in a non-violent
10 way which was something new, too.

11 Mike While there is no violence here, the other games
12 that had become extremely popular in the video game business,
13 induced shooting and blowing up, explosions, a lot of action,
14 a lot of violence.

15 Q What happened next, as far as you and Mr. Staup were
16 concerned and a game like Pac-Man?

17 A Well, I was working on another game at the time and
18 as we always do, we just, you know, look around, see what
19 is going on until I am finished with a particular project.

20 At that point in time, we had to make a decision
21 on what direction he wants me to go in next. So we really
22 did nothing except kind of talk about it. I kind of put it
23 in the back of my head and looked at it in terms of what
24 could be done to make it a good game.

25 Again, it became a very popular game on its own

the Pac-Man. He didn't like it at the time. I remember merits but I didn't perceive that. The only one I would say saying, "Trust me," and he said, "Well, let me see." really liked it was Mike's wife who was quite strongly opinionated that it was a quite good game.

Q Why did she like it, do you know?

A Well, in my opinion, because it is very competitive, and yet, it is non-violent and has incremental scoring.

Q Then what did you do next? Did there come a time when you decided to work on a new maze chase game?

A Yes. We finished up -- I finished up, my wife and I finished up the game we were working on and we sat with Mike. The group at Magnavox decides where we are going next on a game, and decided that we wanted to do a maze chase game, that that was becoming a very popular concept in the industry. And it was also a good mix with our product life.

I didn't want to do Pac-Man. Mike very strongly wanted to do Pac-Man, from a marketing point of view, because if you can get the trademark of a name, you can make a lot of ground, from an advertising point of view and from popularity, from riding on the coattails, of course.

From my personal point of view, I didn't want to do it because it didn't give any room for creativity. You know, you factually get no credit for creating any new concepts or any new ideas.

And so I presented several ideas to Mike on how I could do a maze chase game that was significantly better than

the Pac-Man. He didn't like them at the time. I remember saying, "Trust me," and he said, "Well, let me see if I can get Pac-Man."

Q About when was this?

A This was approximately May of 1981. I was pretty confident that he couldn't get it, incidentally, because I

Q That is since November 1978, when this lawsuit was felt by the time he would have got it, I would have been

far enough into the game to show him the concepts I had in

mind and could have convinced him that they were better and

I was pretty sure that he couldn't get it away from Atari

because of relative market size, he hadn't stood a chance

on getting an name.

Q Did you ever play Pac-Man?

A Yes.

Q When did you first play Pac-Man, as best you can recall?

A When we were making a decision on whether to go with it or not we went out to the arcade and the best I recall, I played it no more than twice.

Q That was two quarters?

A That was a two-quarter and that probably totals for me about three to five minutes of playing. I am not very good at playing. And I would say I watched for approximately five minutes, also.

Q Have you played the game Pac-Man, the arcade game,

1 since that time?

2 A I really haven't even thought about it until
3 this legal situation came up, and in your office and in the
4 arcades, I became updated on the differences of it and I
5 played it more than I ever played it before.

6 Q That is since November 18th, when this lawsuit was
7 filed?

8 A Yes.

9 Q Can you explain what you did in developing your
10 new game and what features you provided?

11 A Well, there are several things that have become
12 obvious to me as a designer that the consumer wants to see
13 in a game.

14 One of them -- and I judge that from the popularity
15 of games that have these concepts, you know -- one of them
16 is a lot of movement on the screen. And I felt like we needed
17 a good game that had a lot going on.

18 It also needs to have incremental scoring. A
19 combination of the two is usually most successful and so if
20 you can have small -- if you can achieve a point with a lot
21 of action going on easily and then have that point become
22 progressively harder to get, it kind of hooks the consumer --
23 he is always trying to get that next point even though it
24 is a little harder.

25 And thus came up the concept of the moving dots.

It is kind of like the carrot on the stick, if you use the analogy. The first bite is very easy and you say, "This is simple." And then you scoop the carrot out a little bit and the second bite is kind of easy and by the time you get to the last bite of that last moving dot, it is quite difficult to catch. In fact, it is moving as fast as you are so you can no longer, what I call, play the object. You have got to play the grid. That is not true of the first part of the dots. They are moving much slower than the player-controlled character of K. C. Munchkin. It was very easy to get those.

Q Now can you explain a little more what you mean by play the object and play the grid and maybe I will interrupt you and change the cartridge and put the K. C. Munchkin cartridge in the Odyssey console and have the K. C. Munchkin cartridge marked as Defendants' Exhibit 17.

THE COURT: That is Exhibit 17?

MR. ANDERSON: Yes, your Honor, Defendants' Exhibit 17. Let me get the label on Exhibit 17.

BY MR. ANDERSON:

Q I hand you Defendants' Exhibit 17, the K. C. Munchkin cartridge Mr. Averett. Will you demonstrate the cartridge and how it is played for the Court, please.

A What I am talking about when I say, "Play the grid," as opposed to the object, if you are moving, if the player-controlled object is moving slower or faster than an object

you are running down, all you have to do is run it down.

Q I can speak louder. You don't have to worry about where it is going, like I can catch that dot. I never had to concern myself about whether it is going to zip through. So I wasn't having to play the grid. I was just having to run the object down.

Q That is because the Munchkin is moving faster than the dot. That, in my opinion, is a very important fact behind the dot is?

A Yes, that's correct. Now in the case of the relationship between K. C. Munchkin and the munchers, just the opposite is true. They are moving at exactly the same speed all the time and so you have to play the grid. So if I want to avoid it, I can avoid it by running a straight line but the dots are moving, if you have a layer of concentration of it will catch me on the curves.

What I can do is play the grid. If I can run down here and run through here and effectively fake it off through

the grid, that is the objective and you can avoid or try to catch an object when you are playing the grid, in my terminology. I guess what I am trying to say is when you are playing a new grid game -- I mean, this is true of any grid game --

THE COURT: The court reporter is having --

Mr. Grice, is it possible to get that

microphone and disconnect it from the podium? Does it reach over there?

THE CLERK: It reaches a certain distance, your

Honor.

THE WITNESS: I can speak louder.

THE COURT: Why don't you use that microphone and go ahead. Just use the microphone. Speak into the microphone.

BY THE WITNESS:

A-- That, in my opinion, is a very important idea behind this game in that it is no longer -- the purpose of the dots is no longer to give incremental scoring here, but the purpose is to provide action on the screen and to change the play.

The other real important fact here is that since the dots are moving, if you have a lapse of concentration of only a half a second or less, the whole playfield changes. You can't say, "What" and then look back and play the same game.

So, it is always constantly changing. So, if you are able to keep your concentration honed in, you can count on the dots being pretty much in the same area but you can't count on the munchers being in the same area. They are a function of your position, not a function of time.

The other real important concept here is the moving grid. I don't think anybody has used a moving grid in any of the grids I am aware of, like this.

At first glance you might say well, it is just something cute and ornamental but it is really not. It has

two very important purposes. One, you can hide in here and if I could -- I am not sure I could do it -- and avoid the move up here -- oops, I didn't do it that time. I will give it one more shot. There we go.

Now in certain situations, you can get in there and avoid -- so, it is a new way of playing the grid that is a more dynamic way. And it also has a big effect on how soon the munchers are regenerated. I think it is bad when anytime they are in any part of a playfield, you can always count on something happening in a given period of time because then it becomes, you can figure it out. If you can make it random where you don't know, if you bite something or catch something, how soon it is going to come back at you, it makes the game much more challenging if you can't figure it out. That is the case here. These guys do not come back when they are munched and just go back in here (indicating). We have to kind of search around trying to catch this little cat.

Now, to make the point even more specific for the consumer I have a special purpose grid showing how you could use the cup to segment off the grid. In other words, you can't get in this section of the grid here without utilizing this cup to maneuver into it. It will run down here and run out (indicating). Of course this changes the game entirely compared with the cup in here. I have got to try to get out

before he catches me. segments by use of the keyboard here

and the There is a line missing here. Now I run in. I have to clean the dots up here real quickly and try to get here, right on in there (indicating) okay.

So, you see it is a very important play point that is specifically brought out by a grid that you have to use it so the consumer will realize, hey, it is not ornamental, it is very functional. Let me see. Of course, there is a tremendous variety of grids in this.

Q Will you describe the various grids and grid combinations for us, Mr. Averett?

A Possibly the best way to do that is in the programming mode. There is a programming mode that will allow me to select any of the four grids here.

I can select Grid 1 which is this one. I can start at zero. This is Grid 1. I can select the 2. I can play any of these grids if I choose to do so.

THE COURT: Is the grid synonymous with the word maze?

THE WITNESS: Yes.

THE COURT: Go ahead.

BY THE WITNESS:

A Or 3, which is the one we were just looking at or a random one where everything changes. And you can start playing from there. You can also take in or remove or place

in any of these grids segments by use of the keyboard here and the programming mode which is what I am in now.

There is always a section of grids that are invisible when you are moving so you can catch the consumer's concentration even more. So, to see where he is going, he has to stop and put himself in jeopardy before he can continue to play. He has forgotten where the openings are and how the grid is oriented.

Now this is particularly important in a game like this where you are trying to play the grid and not play the objects. If the objects were moving slower, then it would be very possible to just run them down. But when you are having to play the grid that invisible part makes it more difficult.

There is a cadence to this on here too. Let me turn up the sound here a little bit. I can't play that one, it is too hard for me.

There is a cadence that you get in the K. C. Munchkin here. It is similar to a drumbeat. That's not it. That's it. And that cadence is a function of your score and a function of the screen and the purpose of that is, it is really critical in video games, in my opinion, because it is the heartbeat, it is like music with a rhythm. So, it is the rhythm of the game which either gets your heart going or gets you in tune with the game. If it is not the correct rhythm for the play

of the game, it is like a song with the wrong beat.

The other, the remaining significant thing is I feel it is very important in all my games to personalize as much as possible the object that the player controls so that the player relates to an object.

Consequently, we made K. C. Munchkin just as cute as a bug's ear and haven't worried too much about these guys. They are kind of malicious looking. But, there was no real extent or attempt made to give them smiles or anything like that. K. C., he smiles and he grins. When he clears the screen he actually grins. I don't know how you clear a screen under these conditions.

It is very animated. The purpose would be that the consumer would say, "I am this creature here. I am K. C. Munchkin running around." You get that rapport built up. And those are the ideas I was trying to get across in K. C. Munchkin.

Q Can you clear up the dots to show the speedup of the dots during the play of one frame or is that asking too much?

A We will see. Now watch that last dot. Now he is moving at the same speed I am and he is a lot smarter. I could never run him down. That K. C. grin, the good old grin, and the cadence and the rhythm of the whole game has now picked up considerably.

Q And those dots can go anywhere on the screen, is that correct, Mr. Averett?

A Yes, they can.

Q Without limit?

A Yes. That is pretty much the ideas I was trying to get across and I felt I did get across in K. C. Munchkin.

Q Now in adjusting the whole TV set, who controls the colors that appear on the screen?

A The consumer.

Q In playing any Odyssey game, such as K. C. Munchkin, how does he adjust the colors so that he knows they are properly adjusted?

A Well there should be an instruction book, a "select game" with the correct color control.

Q You use that opening legend, "select game" to adjust the color?

A Yes.

Q Will you just briefly demonstrate how you can change the colors? I might say the control is right there underneath.

A Okay. That is changed. We have changed yellow to green, and red to orange. You can just about skew all the major ones. The color is even better.

Q And when it is properly adjusted?

A Well, when it is properly adjusted, it should

correspond to the "select game" and Magnavox principle on the cartridge. I am not a TV person. I believe that is pretty good.

Q Going back to the K. C. Munchkin maze, if you will, one of the games, would you press the button for that?

After you Now what color is the maze when the set is properly adjusted? slow down to what I would say is about half speed.

A The maze should be purple. The munchers, it is kind of hard to tell because they overlap right there. I believe they are red, yellow and green.

K. C. is blue and when the super munchie is eaten, they turn purple. That is purple, which matches the blue background or the purple background? the grid. You just

look Q Thank you. path to where they are and go for them.

But see In the K. C. Munchkin, at any given stage of play, at any given time, what is the relative speed of the munchkin versus the three munchers? your experience, do they

ever A The munchkins and -- or the Munchkin, K. C., and the munchers always have the same relative speed. To play each other, you always play the grid. play and scoring of

the Q Then the munchers never run at a speed less than the munchkin runs in moving? munchkin?

A No. I, when S. T. is caught, that is the end of

the Q Now you have studied Pac-Man at some length in the last two weeks or ten days you have indicated, Mr. Averett.

Can you tell me in your experience with Pac-Man, does the Pac-Man and the three ghosts travel at the same speed at all times?

A No, they don't. I believe they travel close to the same speed during the -- when they are after Pac-Man, after you eat what they call their power pill, I believe, then they slow down to what I would say is about half speed.

Q What difference does that make in the play of Pac-Man as compared to what you have just described with respect to K. C. Munchkin?

A Well, it means you play their dinky, winky and whatever they are called here. You try, you can run them down. You don't have to worry about the grid. You just look at the shortest path to where they are and go for them. But are they going to be there and you are going to be able to take them in any situation --

Q In Pac-Man, from your experience, do the dots ever move?

A Never. I have never seen them move.

Q Now with respect to the total play and scoring of the game, what constitutes one complete scoring series or event in your game, K. C. Munchkin?

A Well, when K. C. is caught, that is the end of the scoring cycle. He is caught one time and then your maximum score then, if it is the best score, is transferred

over to the left-hand part of the screen to become the best score to date and you are allowed to print in your name or any word that you see fit.

Q You can print in your name on the display?

A Yes, you can.

Q Is it possible to show that or would that be difficult?

A No.

Q And explain what you are doing, please while you are doing it.

A I probably should score a point here. No. I have got nine points. If this is the best score --

Q That is on the left?

A Yes.

Q That is just up until now?

A Yes, up until now. And you are allowed to put in your name with a question mark. By the way, in the flashing sequence, the computer is asking the player to enter your name, that you have the best score, go ahead and put it in. Okay. I will put it in. I will put out the question marks. It will remain here and continue to flash every time somebody else gets beat until somebody clears or betters this score and then the question marks will come back up again and they will flash asking the player to reenter the new champion, to reenter his name.

Q Now is there anything at all like that as far as you know, in Pac-Man, from your experience?

A No, I don't believe there is.

Q Are you aware of what is known in the arcade game business as an attract mode?

A Yes. You see that in airports. You see that

Q Will you please explain to the court what an attract mode is?

A Well, in an arcade setup, you have an abundance of machines and you are trying to catch the players' eyes as they go around with quarters in their pockets, so you are trying to put a mode up there that will entice the player to play.

Q And does Pac-Man have an attract mode?

A Oh, yes. It is similar in concept, though, because

Q Does K. C. Munchkin have any kind of attract mode?

A No.

Q At what point had you --

THE COURT: Before you leave that, isn't it true that K. C. Munchkin is not an arcade game or did I miss something?

MR. ANDERSON: K. C. Munchkin is not.

BY MR. ANDERSON: That is, that the copyright on Pac-Man only

Q Well, is K. C. Munchkin an arcade game?

A At this point, K. C. Munchkin is not an arcade

game but it is bought by a consumer that is going through a store looking at various games so there is some similarity, I think.

THE COURT: As I understand it, an arcade game like Pac-Man is a form of game that is kept in what is called a game arcade. You see them in airports. You see them in private clubs. I think the Union League Club has an arcade. Am I right about that?

THE WITNESS: Yes, your Honor.

THE COURT: While the home video game is intended for the consumer who purchases it, although he may, if he wants to, I suppose, can assemble a number of these games into a private arcade, I suppose.

THE WITNESS: Well, that is absolutely true but in one sense, it is similar in concept, though, because instead of putting a quarter down you put \$20 or \$30 down.

THE COURT: I understand.

THE WITNESS: And a lot of stores display these games in an active mode.

MR. ANDERSON: Your Honor, two courts, the International Trade Commission and another court have held, as I understand it, that the copyright on Pac-Man only covers the attract mode in the first instant of play.

MR. VITTUM: Your Honor, that is not true.

THE COURT: Let us not go into the case law. Let us not argue. Get the evidence in the record. Let me interrupt to tell you at 10:00 o'clock you are going to have to have a short adjournment because I have a number of small matters that are going to come in at 10:00. Bear that in mind.

Let's go ahead.

BY MR. ANDERSON:

Q At what point had you developed the play of the game to the point that you just described for Judge Leighton, Mr. Averett? When was that done?

A Well, I had it to a point where I could show Mike Staup and the people at Magnavox that I felt my ideas were superior to Pac-Man, in approximately the end of June, the first of July time frame.

Q I would like to show you the copy of the instruction book for K. C. Munchkin which is Defendants' Exhibit 3, Mr. Averett. On Wednesday you were made to suffer with a copy. I would like to give you the original at this time.

Mr. Averett, can you explain or briefly point out where in the instruction manual for K. C. Munchkin the characters and their shape are shown, just for the record?

A They are shown throughout, but I believe there is one illustration -- my pages aren't -- here we go. Page 8 in mine. It shows the munchers. There should be a better one.

Oh, it is Page 15. I am sorry, your Honor. It shows both the animation of the munchers and K. C.'s beginning, of course.

Q And K. C. Munchkin is the little guy on the right?

A Oh, yes. A grid maze chase game, very little or none.

Q And he is blue?

A Yes. I was to do something uniquely different.

Q And the other two are two examples of the munchers, is that correct?

A Yes. I just briefly describe the scoring in

Q Now all right. Now what happened next, Mr. Averett, in your development of K. C. Munchkin after you reached that point?

A Well, it was about that time that Magnavox found that they could not obtain the rights to Pac-Man in the consumer area and so I got the green light to go ahead and finish the game that I was working on, which I did and completed it in the office time frame.

Q And any time during the course of your development work, did you ever have a Pac-Man arcade game in your possession?

A No. I want to have that, really, you know, I do.

Q Did you ever see or have any knowledge of what was inside of the yellow box that is a Pac-Man game?

A No. I don't. I don't know what it is.

Q To what extent, if any, did you use Pac-Man in your

design of K. C. Munchkin?

A. Well, I saw Pac-Man in the beginning, of course, and outside of the drift of the consumer saying he wanted it or it was time for a grid maze chase game, very little or none at all.

My idea was to do something uniquely different, that could be recognized as something that was different and a market entity into itself.

Q. Can you just briefly describe the scoring in K. C. Munchkin?

A. Well, you get one point for eating one little white munchie. You get three points for eating the flashing multi-colored munchies and you get, I believe it is, five points for the first muncher that you eat and if you can catch another one before the other one rejuvenates itself, it is ten points. I believe it is 15 or 20 points on the other ones.

Scoring is really more of a function of the number of digits that you have in the display and the field than it is of anything else.

You want to have that carrot, you know, like getting back to my carrot, you want to have a little nibble but not too much because if you run it up too fast, you get too big of a score too fast, you run out of digits and the consumer throws it away.

Q Where did you obtain the sounds that you have employed in K. C. Munchkin?

A Strictly a creation between my wife and myself.

Q Is there any relationship between those sounds and the sounds that you have used in other Odyssey games?

A Yes. There is a sound generator within Odyssey which limits itself to some extent to the sounds you can do, but it also provides, you know, it is programmed, where you have a wide variety of things you can use.

Q From your experience in the last week or so with Pac-Man, is there any relationship that you are aware of between Pac-Man's sounds and Odyssey sounds?

A I don't believe anyone would ever confuse, if they couldn't see the screen or any other part of it, the sounds and turn around and say, "Hey, that is a Pac-Man-sounding game." I don't think that would ever happen. I don't think there are any sounds that are even similar.

Q Mr. Averett, where did the name of your game, K. C. Munchkin, come from?

A That was a stroke of marketing genius from Mike Staup, I think, the President of Magnavox or -- let's see -- North American -- anyway, the group down there, NAPA. Anyway, his name is K. C. Makin and K. C. had a good ring to it, K. C. Jones was running around for awhile.

And then Mike said, "Well, if we are going to use

K. C. and we like that, why don't we use K. C. Makin or K. C. to kind of cute it up a little bit, I guess, K. C. Munchkin."

Q With respect to the other symbols, the munchers and the munchies, where did they come from?

A I have really very little knowledge of that. All of the work after the software is completed is done by other people but it was not created by me, or the writing and the art people.

Q Mr. Averett, you were sitting here on Wednesday when the question of wraparound came about. Have you ever used wraparound in any games that you designed before K. C. Munchkin?

A Oh, yes.

Q Can you name one or more of those?

A Well, I think one of the first ones that we used it on was Alien Invaders Plus, which was done in about 1979, I believe, in production, copyright.

It was a case where the players controlled the object and which, in that case, was a space ship that was able to wrap around the sides.

Wraparound is as common as mazes or grids. It is part of the features, like moving across the screen except instead of moving across, you move around.

Q Did you design a game called Invaders from Hyper

Space?

A Yes.

Q Does that use a wraparound?

A Yes, it does.

Q I will have marked as Exhibit 18 a cartridge labeled Invaders from Hyper Space. Is that a cartridge which you designed, Mr. Averett?

A Yes, it is.

Q Can you place that in the Odyssey 2 cartridge and explain very briefly how wraparound enters into that game.

MR. VITTUM: Judge, I will object again. It seems to me we are getting far afield. There is no showing there is any maze at all involved in this matter. We are again, it seems to me moving far afield from a comparison and similarities of the two games that are before the Court now.

THE COURT: What is the --

MR. ANDERSON: Your Honor, once again, the test is not similarities in a copyright infringement case of this kind.

MR. VITTUM: It certainly is, your Honor.

THE COURT: Gentlemen, please. One at a time.

Let Mr. Anderson finish.

MR. VITTUM: Excuse me.

THE COURT: Go ahead.

MR. ANDERSON: The test is the copyrightable material and similarity of the copyrightable material and that is completely different from the game because it depends on the difference between concept and expression or implementation or audio-visual display. Concept, idea, system, cannot be protected. That is in the statute. That is in Section 102(b) of the statute.

MR. VITTUM: May I be heard very briefly, your Honor?

THE COURT: Yes.

MR. VITTUM: The difference between idea or concept and expression of that idea is basic to copyright law. It is true in the context of motion pictures, it is true in audio-visual games such as these games. It is no different there and the issue in all of these cases is substantial similarity of the audio-visual work.

THE COURT: All right. Let us finish asking questions of witnesses. I will hear you afterwards on what is the test and the other principles of law.

Let us proceed now.

MR. ANDERSON: Thank you, your Honor.

BY MR. ANDERSON:

Q Will you proceed, Mr. Averett?

A In this case, the player shifts are these right

here, the little gizmos that I am shooting here. These are computer-controlled.

Again, I have a chase and be-chased game.

If you continue to push to the right here -- that wipes out.

If I continue to push to the right, of course the shift will reappear on this side and it will speed back across and disappear from this side and reappear on this side (indicating) and, of course, going the other way the same way.

MR. ANDERSON: Thank you.

THE COURT: All right.

MR. ANDERSON: I will have the reporter mark --

BY MR. ANDERSON:

Q Mr. Averett, did you also design a game called Subchase?

A No, I did not.

Q Are you familiar with Subchase?

A Reasonably, but not intimately, no.

Q Is that one of the Odyssey 2 games?

A Yes, it is.

Q Does it have wraparound?

A I believe it does, yes.

MR. VITTUM: The same objection, your Honor.

THE COURT: That objection will be overruled.

MR. ANDERSON: I will have the reporter mark as Defendants' Exhibit 19 the Odyssey 2 cartridge for Subchase.

BY MR. ANDERSON:

Q Mr. Averett, will you please demonstrate briefly how Subchase operates and whether or not it does have wraparound?

A Well, Subchase as you can see, where the computer, I believe in this mode the airplane is dropping bombs on the ship down here. This is a standard game that came up about three years ago. It enters this side of the field and exits this side of the field and enters this side (indicating).

As I say, wraparound has been common in numerous games. It is nothing really special.

Q Were Subchase and Invaders from Hyper Space both games introduced in Odyssey prior to 1980?

A Oh, yes.

MR. ANDERSON: Thank you, Mr. Averett. That completes the direct examination, your Honor.

THE COURT: All right.

MR. ANDERSON: I am prepared to begin the cross, your Honor.

THE COURT: We have a little more -- a little less than ten minutes. Go ahead.

MR. VITTUM: Thank you.

CROSS EXAMINATION

BY MR. VITTUM:

Q Mr. Averett, let us start with Take the Money and Run. I trust you can recall the game well enough so we don't have to put the cartridge back in. I would like to ask a couple of questions about what that game involved.

First of all, Take the Money and Run, did not involve wraparound, is that right?

A No, it did not.

Q There were no dots on that field within the maze that was shown there?

A No, there were not.

Q There was no offensive, defensive turnaround between the characters such as you find in K. C. Munchkin, is that right?

A The offensive, defensive turnaround was a function of timing and catching something. I assume there was.

Q There is no power capsule?

A No, there are no power capsules.

Q I believe you mentioned in the scoring for Take the Money and Run, the final scoring was based on some subtraction at the end of the game, is that right?

A Addition or subtraction, depending on which mode you were in, whether you were in a chase mode or a be-chased mode.

Q There is no similar subtraction final computation in K. C. Munchkin, is there?

A It is an addition.. It is not a subtraction, no.

Q I would like to review, if I can, the sequence of some of the events that came out from your direct testimony and I believe, if I have the timing right, your testimony was that in February of 1981 you and Mr. Staup, passing through an airport in New York, saw Pac-Man in an arcade at that time, is that right?

A It was in Atlanta, but, yes, that is correct.

Q In Atlanta? Some of some further changes that ought

A Yes. The game that you had initially submitted, is

Q And you saw the game being played in the arcade there although you didn't play it yourself, is that correct?

A That is correct. Some changes in the facial appearance

Q And later on, during the spring of 1981, you personally did play the game?

A Yes, I did. Certain extent, yes.

Q And as a result of the meeting between you and Mr. Staup, you proceeded with your project to develop the game that is now known as K. C. Munchkin, is that right?

A That is correct. It was to have been yellow.

Q And sort of simultaneously, the folks from North American Phillips were undertaking to obtain a license to the Pac-Man from the copyright owner, Midway, is that right?

A That is correct.

Q And sometime along in towards the summer, I believe in June or July, you submitted your game to North American, is that right?

A Yes.

Q And by that time it had been found out that you could not get a license for Pac-Man because Atari had the license, is that right?

A That is also correct, yes.

Q And it is also true that North American made several suggestions to you in terms of some further changes that ought to be made in the game that you had initially submitted, is that right?

A That is correct.

Q So that you made some changes in the facial appearance or character of your munching character, is that right, your K. C. Munchkin character?

A Yes, to a certain extent, yes.

Q And you changed the color. The color was originally yellow, wasn't it?

A Yes. I feel yellow is a more personable color than blue. I would have liked to have used yellow.

Q But North American told you you better not use yellow because that is the same color as the Pac-Man, isn't

that right?

A That's correct.

Q You also changed the colors of your muncher characters or the monster characters, didn't you?

A I don't believe we did. We changed K. C., because we didn't want any confusion.

Q So that is the only change, is that right?

A I believe it was, yes.

Q And with that sole change, designed to make K. C. Munchkin more different in your view than Pac-Man, the change from the yellow Pac-Man character to the blue that shows on the screen, you went ahead and the game was produced, is that your testimony?

A Yes, it is.

Q Now I believe when we first saw the K. C. Munchkin game shown on the screen here today, it was a purple maze, is that correct?

A That's correct.

Q And I believe it was your testimony that that was the color of the maze that should show when the game is played, is that correct?

A That is correct.

Q I am puzzled, Mr. Averett, because, let me show you the color advertisement that appeared in Newsweek Magazine earlier this month as Plaintiffs' Exhibit 6 in evidence

and it appears very much to my eyes that the maze that is shown is blue, is that correct?

A It seems bluish purple but -- I think it is not clearly -- it is not clearly purple, let us put it that way.

Q It is blue, isn't it, sir?

A I think it is more blue than purple but it has purple aspects.

Q That same bluish color is the one that appears on the large point of purchase materials that are used by North American Phillips in marketing K. C. Munchkin, isn't that right?

MR. ANDERSON: I object. No foundation for that, your Honor.

MR. VITTUM: Well your Honor, I think that is highly relevant insofar as it bears on the --

THE COURT: Now, now, Mr. Vittum, let me first hear Mr. Anderson's objection. Will you state your objections so I can hear you?

MR. ANDERSON: Your Honor, the question is about some point of sale advertising. There is no foundation that the witness has seen it or has any knowledge. I think there should be a foundation.

MR. VITTUM: Well certainly if the witness has not seen it, that is the answer to the question.

THE COURT: The objection is overruled. Just

proceed now. Go ahead.

MR. VITTUM: I am sorry.

BY MR. VITTUM:

Q Do you recall the question?

A I really couldn't tell you. I have seen it but I don't recall one way or the other what color it is.

Q Incidentally, your wife has played the Pac-Man you game at various times during the project in which she helped you design the K. C. Munchkin game, isn't that right?

A No. Actually, she never played it.

Q But she did see it?

A No. Actually, she never saw it.

Q I would like to direct your attention to a series of questions concerning the various characters and the way they appear in the K. C. Munchkin game and see if I can understand what your testimony is concerning these basic features.

As I understand it, the K. C. Munchkin game has a central gobbler-type character that is moving under the control of the player who moves around a maze munching dots and scoring points, is that correct?

A That is correct.

Q Now in K. C. Munchkin, this gobbler character has to avoid the monster characters which you call the munchers, I believe, is that correct?

A That is correct.

Q And if the gobbler character does not avoid the monsters, he is, in effect captured and he deflates in sort of a spangly form on the screen, is that correct?

A He is removed, yes.

Q Now K. C. Munchkin, when the gobbler munches one of the special dots, you have a condition for a few seconds in which the munchers are vulnerable and you reverse, if you

will, the situation so that the gobbler character, as it contacts the muncher, it can destroy the muncher, is that right?

A That is correct.

Q And the monster, when it is destroyed, turns into a sort of a silhouette of white on the screen and that returns to the central corral at that time, is that correct?

A Yes, it tries to.

Q And when it does make it to the central corral, then it regenerates and it ultimately comes back up in its form, is that right?

A That is correct.

Q And after a short period of time when you have the reversal between the gobbler character and the monster character, the monster characters will flash blue and white on the screen before they will return to their normal color, is that right?

A I believe it is purple and white but I would have to check my program to make sure.

Q But in any case, it flashes a signal to the player that they are returning to their normal condition.

Q Now, in K. C. Munchkin, you score points by munching dots, is that right?

A You score points by munching dots and trying to capture the munchers.

Q I just want to take up the scoring functions separately.

So, you score points by munching dots?

A Correct.

Q When you munch some of the special dots, you get multiple points, is that correct?

A Yes, that's correct.

Q You also get bonus points or multiple points when you are able to contact one of the monsters when it is vulnerable, is that right?

A Yes.

Q And if you are lucky enough to be able to contact the second or possibly the third monster during a single condition of vulnerability, you get multiple points again, is that right?

A That is also correct, yes.

Q And you can also, while you are operating in this maze, as you control your gobbler character, you can pass out one side on the wraparound from the maze and in the other side,

isn't that right? I just have one more question, I think.

A Yes, this.

Q Incidentally, those games that you talked about at the end of your direct testimony, I believe Alien Invader from Hyper Space and Subchase, those were not maze games, were they?

A No, they were not maze games. It is a fact, is it not, that

Q In K. C. Munchkin you can switch strategy to maneuver your gobbler character to a position where it is located adjacent to special dots and sort of wait there until you find one of the munchers coming nearby so that you can then munch the special dot, reverse the roles, and be able to contact the monster character and destroy him. Isn't that good strategy?

A Well, you have to be careful, though, because it is moving on you and while you may position yourself in one point of time, if you don't have the fellow pretty close to you and your strategy is incorrect, it will move away from you or move into you and you will get it at the wrong time.

Q But if you pay attention to that, it is good strategy, isn't it?

A It is good strategy to eat the special munchies when you are close to them.

THE COURT: Mr. Vittum, I think it is time for this 10:00 o'clock adjournment.

MR. VITTUM: I just have one more question, I think, to finish this.

THE COURT: Go ahead.

BY MR. VITTUM:

Q The final question, Mr. Averett is, with respect to all of these features that we have described and you have testified to for the K. C. Munchkin game, it is a fact, is it not, that each and every one of these features that you have just testified about, is also present and true in the audio-visual presentation of the Pac-Man game, isn't that right?

MR. ANDERSON: I object. The question was audio or visual or --

MR. VITTUM: Audio-visual. It is one word from the statute.

THE COURT: Did you hear the question?

THE WITNESS: Yes, I heard the question. I would really like to --

MR. ANDERSON: Your Honor --

MR. VITTUM: I will take it point by point after the break, your Honor. That is all right.

THE COURT: Now before we do break, let me ask you gentlemen to give me some idea how much more time this case is going to take this morning for me to finish hearing, or today? Give me some idea because I have to parcel time to different cases. Give me some idea

how much more time this is going to require.

MR. ANDERSON: Your Honor, we have two more witnesses, Mr. Staup who I would think would take half an hour to perhaps 45 minutes and Mr. Giese who should not take more than 15 or 20 minutes.

THE COURT: Mr. Vittum?

MR. VITTUM: Your Honor, I just have a few more minutes of cross for this witness. I don't anticipate at this moment having an additional witness. I have a couple of additional documentary items.

THE COURT: I just want to get some idea.

MR. VITTUM: Surely.

THE COURT: Let us take a short adjournment. Get the other people ready, Mr. Grice.

(Thereupon the Court gave attention to another matter on the call after which the following further proceedings were had herein.)

THE COURT: You may proceed.

MR. VITTUM: I will segment that final question and try to make it a little more simple.

BY MR. VITTUM:

Q Mr. Averett, in the Pac-Man game as shown in Plaintiffs' Exhibit 16, the Pac-Man has a gobbler character that moves around the maze munching dots and scoring points,

isn't that right?

A Yes. That is correct.

Q In Pac-Man, the gobbler character has to avoid the goblin monsters which normally deflate the gobbler character as they contact him during the play, isn't that right?

A It will, certainly, yes.

Q And in the Pac-Man game when the gobbler character munches one of the special dots, you have a period of time where you have a reversal and the goblin monsters or ghosts are vulnerable and if they are contacted by the gobbler character, they will be destroyed, isn't that right?

A Yes, that's correct.

Q And then you have a white silhouette of the monsters that have been returned to the central corral, is that correct?

A No, that is not correct. In fact, Pac-Man, as I recall, has a pair of eyes that propagate back to the center of the screen.

Q Okay. That is, the eyes of what previously had been a monster, is that right?

A Yes, it is.

Q And they go back to the central corral, is that right?

A Yes.

Q And they are regenerated then, is that right?

A That is correct.

Q And in the Pac-Man game, you score points by having the gobbler character munch dots, is that right?

A Yes.

Q And you get multiple points for munching the special dots that are located in the corners, is that right?

A I really don't know.

Q And you get bonus points for having the gobbler munch the monster characters when they are vulnerable, isn't that right?

A That's correct.

Q And you get multiple bonus points if you are successful in contacting successive ones of these monsters during the period of time -- a single period of time when they are vulnerable, isn't that right?

A Yes.

Q And in Pac-Man, it is good strategy to take the gobbler character and to go over and wait near one of the special dots until the monsters approach and then munch the special dot and contact the monster character, isn't that right?

A Actually, I don't think so, based on what I have read in the trades now. The best strategy is to follow a set pattern in the grid.

Q But you understand there are people who do follow that strategy I just described in playing the Pac-Man game?

A Yes, I would say there are people that would stay next to a dot but in terms of the real strategy behind it, I really haven't developed one.

Q I am sorry. I may have just asked you but I will ask you again. In the Pac-Man you move the goblin character around through the maze and you can move it through the tunnel wraparound out one side in the other side to avoid the monsters or gobblers, isn't that right?

A Yes, that's correct.

Q Now what I have just described in relation to Pac-Man is what you have described in your testimony as incremental scoring, is that right?

MR. ANDERSON: I object. I don't know what he means "what you have just described," your Honor.

MR. VITTUM: Let me rephrase the question.

THE COURT: The question will be rephrased.

BY MR. VITTUM:

Q Could you describe what you meant in your testimony when you indicated that incremental scoring was an important feature of the Pac-Man game that you had observed when you first saw it?

A Okay. Prior to the several very successful games that have come on, there was basic scoring where when you achieved a given objective, you got the point or center points. In Pac-Man, it would be like if you got the things you were

chasing, you got the monsters, the incremental scoring that I was referring to is when you can get a little point for doing a little thing like if you would get a little point for the concept of catching that dot immediately and that's a new concept that I think Pac-Man brought.

Q And I believe that was your testimony, your testimony was that that was a real contribution by Pac-Man, isn't that right?

A It was the first grid game that used incremental scoring. It wasn't the first game, of course, that had incremental scoring but it was the first one that placed it in a chase -- well, I take that back, I am sorry. Head-On, I believe had it.

Q Head-On was a game involving cars, was it not, racing cars?

A It was a chase game. It was a chase game.

Q In any case, Pac-Man involves this incremental scoring concept which you described?

A Yes, it does.

Q And that same feature is found in the K. C. Munchkin game that you designed, isn't that right?

A The same concept is, yes.

Q Well, it is not only the same concept, though, it is the same way that concept appears in the audio-visual sequence of having a goblin character moving around the maze, munching

dots, munching special dots and also capturing monsters, isn't that right?

A No, I would disagree with that. I think the movement of the dots significantly affects anything you do with them. I would say it is correct to say that the concept of scoring a point when you finally catch ^{one} is the same, but, in terms of the way they interact with each other and the way you play is entirely different.

BY MR. VITTUM:

Q Well, sir, with all due respect -- THE COURT: Don't argue with the witness. Don't argue with the witness. That is his answer. Let us go to something else.

BY MR. VITTUM:

Q When the gobbler character in K. C. Munchkin captures the dot, that event produces the scoring result that you have described, does it not?

A Yes, that is correct.

Q You mentioned in your direct testimony that you make it a practice of studying arcade games to find out what is going on there with a view to ^{the} possibility of finding types of games that may be of use to you in designing for the home market, which is your business, is that right?

A Yes, that's correct.

Q And you are familiar then with the practice of

transferring an arcade-type game into the home video format, are you not?

A Yes.

Q And there are certain technical limitations to the home video game based on the memory capacity and things of that nature which make the transfer of an arcade game to the home video game medium, if you will, something that requires that some differences be put into the home video game that is transferred, isn't that right?

A Well, that is a function of the console. There are certain home computers that can transfer this game just as it is.

Q But with respect to consoles such as the Odyssey 2 console or the Atari VCS which has been referred in the testimony last week, as to those forms of home console, that really is a different medium that will permit the arcade game that is transferred to a home video format to appear slightly different, isn't that right?

A I would think you would have to make certain compromises in design. I really can't speak with a lot of authority on the Atari system.

Q Mr. Averett, you are aware, are you not, of the extraordinary popularity of the Pac-Man arcade game?

A I am now.

Q With respect to the K. C. Munchkin game, sir, and

if one puts the cartridge in a console and pushes the reset button and then the zero, you will get a single maze that can permit you to play a complete game with that single maze, isn't that right?

A Well, you get a single basic maze with the rotating grid segment in there so it changes continuously but it is the -- the perimeter is the same.

Q All right. Now that is a maze that is shown in the advertisement, Plaintiffs' Exhibit 6, which I showed you earlier, is it not?

A I couldn't tell you from this picture.

Q Let us put the K. C. Munchkin cartridge --

A Would you like me to do that?

Q Yes, if you would, please. It is Defendants' Exhibit 17. All right. Now that is, in fact, the maze that is shown in the advertisement, Plaintiffs' Exhibit 6, is it not?

A I really couldn't tell you. From looking at it I would say it is not. It looks like an artist's conception of a maze to me. I personally, I don't see any relationship of this maze to any of the mazes that I have but then they don't let me tell the artist how to do the art.

Q And it is also this basic maze that is used in the introductory pages at 3, 4, 5, 6 and 7 of the instruction book for the K. C. Munchkin cartridge. You might want to look

at it. It is Defendants' Exhibit 3.

A I believe I gave it to the attorneys.

THE COURT: Here is the original.

MR. VITTUM: May he look at that, your Honor?

THE COURT: Surely.

BY MR. VITTUM:

Q Again I am referring to the maze that is generated by pushing the zero button on the Odyssey 2 console.

A Actually, it is not. They left out some items.

Q But it is similar to that, is it not?

A It is similar.

Q And incidentally, that maze in the instruction book looks blue, doesn't it?

A If you asked me what it was, I would have said purple. The hand controls look blue to me. I would say the maze is purple.

Q The color is in the mind of the beholder, I guess.

MR. VITTUM: I have no further questions, your Honor.

THE COURT: All right. Any redirect?

MR. ANDERSON: Just a bit, your Honor.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q Mr. Averett, I think you testified about the moving dots in your K. C. Munchkin game.

A Yes.

Q Do you know of any other game that has used moving dots in the play sequence, other than K. C. Munchkin?

A No. I think again, this is the first time this has ever been used in a grid game, any moving objects that were -- where you got points. rough 13, your Honor.

Q With respect to the Pac-Man game, you indicated that it has got a pattern of uniformly spaced dots all over the screen, is that correct? Kunkel testified?

A Yes. ANDERSON: Mr. Paul, I believe, testified about

Q I think you said that you were familiar with the uniformly spaced pattern of dots in various games, including Head-On? MR. ANDERSON: And was familiar with the game Head-On.

A Yes. I have seen Head-On when it was in the arcade. It has uniform dots where you go around and get points by running over them. It is a race game, it is a chase-type of game. through 13.

Q I would like to show you Defendants' Exhibits 6 through 13 which were referred to during the Wednesday session. Are you familiar with the game shown? examination in re-

A Yes. other games on the ground it was irrelevant

MR. VITTUM: Your Honor, I would again object on the same grounds I objected to last week when those exhibits were referred to with Mr. Kunkel.

BY MR. ANDERSON: VITTUM: Your Honor, on cross examination,

Q Is that the -- series of questions about dots and the

THE COURT: Just a minute.

MR. ANDERSON: I am sorry, your Honor.

THE COURT: There is an objection. This is Defendants' Exhibit 3?

MR. ANDERSON: 6 through 13, your Honor.

THE COURT: Oh, 6 through 13.

MR. ANDERSON: They are photographs.

THE COURT: When Mr. Kunkel testified?

MR. ANDERSON: Mr. Paul, I believe, testified about them.

THE COURT: Mr. Paul?

MR. ANDERSON: And was familiar with the game Head-On. He looked at these photographs and he wasn't certain that they were Head-On.

THE COURT: Mr. Paul was shown Defendants' Exhibits 6 through 13.

MR. VITTUM: Yes, your Honor. My objection was based on the objection I made when Mr. Kunkel was testifying and you sustained the objection to examination in relation to these other games on the ground it was irrelevant to the scope of the games that were before the Court.

THE COURT: What will necessitate a different ruling, Mr. Anderson?

MR. ANDERSON: Your Honor, on cross examination, Mr. Vittum asked a series of questions about dots and the

witness referred to the moving dots in Munchkin and the pattern of uniform dots in the Pac-Man game and your Honor again, it is the question of the scope of the copyright involved in this case and what is the copyrightable material and whatever it is that they have registered and we believe and submit that much -- in fact, everything that they have asserted, is not copyrightable material.

The copyrightable material begins when you get beyond concepts and anything that they have that might be copyrightable material, is standard, is well known.

THE COURT: All right. The objection will be overruled. Ask Mr. Averett that question.

MR. ANDERSON: Thank you, your Honor.

BY MR. ANDERSON:

Q Do Defendants' Exhibits 6 through 13 illustrate the Head-On game that you are familiar with?

A Yes, it does.

Q Can you just briefly look at the photographs.

MR. ANDERSON: Your Honor, I have --

THE COURT: I have a set of those.

MR. ANDERSON: All right. Thank you.

THE COURT: I have them.

BY MR. ANDERSON:

Q Can you just briefly describe the manner in which the car functions with respect to the pattern of uniformly spaced dots, Mr. Averett.

A Well, as I recall, one of the objectives of the game is the player maneuvers his race car around the grid trying to eliminate the dots for which he receives points.

Q Do you recall, as he moves around and eliminates dots, does he score points on it?

A Yes.

Q Mr. Averett, in the Pac-Man game, are you familiar with the display of some fruit symbols?

A I am, yes.

MR. VITTUM: Objection, your Honor. That goes far beyond the scope of cross.

THE COURT: The objection will be sustained.

MR. ANDERSON: Thank you, your Honor. No further examination.

THE COURT: Any recross examination?

MR. ANDERSON: Well, your Honor, I would like --

MR. VITTUM: No, your Honor.

MR. ANDERSON: Your Honor, I would like to offer in evidence Exhibits 6 through 19, Defendants' Exhibits 6 through 19. 6 through 13 are the photographs of the Head-On game.

14 is the actual yellow Pac-Man game.

15 is the Take the Money and Run cartridge.

16 is the instruction manual for Take the Money and Run.

17 is the K. C. Munchkin cartridge.

18 is the cartridge for Invaders from Hyper Space and 19 is the cartridge for Subchase, all for use with the Odyssey.

THE COURT: Beginning with 6 through 13, any objections?

MR. ANDERSON: 6 through 19, your Honor.

MR. VITTUM: Objection, on the same grounds of relevancy, your Honor.

THE COURT: The objection will be overruled in view of the last series of questions. And 14 to 19, inclusive, Mr. Vittum, beginning with 14, that is the same item that is in evidence as Plaintiffs' Exhibit 16.

MR. VITTUM: No objection.

THE COURT: 16, those are the cassettes or cartridges you call them?

MR. ANDERSON: Yes, your Honor.

THE COURT: The cartridges about which Mr. Averett testified.

MR. VITTUM: No objection, your Honor. No objection to any of them.

THE COURT: All right. They are admitted in evidence.

15 to 19, inclusive.

(Said exhibits, so offered, were received in evidence as Defendants' Exhibits 15 through 19.)

THE COURT: I want to ask Mr. Averett a question.

THE WITNESS: Yes, your Honor.

THE COURT: Would you go back and put on the screen of the K. C. Munchkin or the Odyssey console that wrap-around that you were discussing in your testimony. I want to ask you a question about it. You put it on when you were answering the questions about the extent to which the wraparound is common in such video games.

THE WITNESS: Your Honor, there were two cartridges, one a special space game and the other one a space game with things moving around.

THE COURT: The last one that you had on.

MR. ANDERSON: I believe that would be Subchaser.

THE COURT: I want to ask you a question. This is in order to enable me to see or test my understanding of the meaning of this term "wraparound".

Mr. Averett, when I first heard that term last Wednesday, I perceived the idea that the wraparound is nothing more in this industry ^{than} the manufacture of audio-visual games ^{with} what is around the edge. Was I anywhere near correct?

THE WITNESS: Yes, your Honor. You are absolutely correct. What passes out here, you simply take the object and place it back here so there is a continuity of components.

THE COURT: Why isn't it that in this one I am looking at right now that has some figures -- well, the figures are changing as we look at it?

THE WITNESS: This is consistent. This will continue. This is the player-controlled object.

THE COURT: I see. Why doesn't this one have what can be described by an ordinary layman as a border? Why is that? And yet you still refer to it as a wraparound. What is the wraparound on this one?

THE WITNESS: I would say probably the main purpose of it on this game is to give you a continuity of feel, that this is a rhythm here. When this plane drops bombs -- it must be out of bombs or something. Here we go. This is a bomb. I think what they were trying to do -- I didn't design the game but I believe the concept of the designer who was working on it, it was supposed to have that rhythm in smooth motion so he could drop it over here and once he got the feel of where the projectory--

THE COURT: Well, in this one can one visually describe the wraparound? Can you?

THE WITNESS: Well it simply goes over here. The

plane disappears off this side and then to the layman, it wraps around the back and reappears here.

Q THE COURT: I see. All right.

A THE WITNESS: Technically what I should do is take it from here and put it over here (indicating).

Q THE COURT: All right. All right.

Q MR. ANDERSON: Could we put the Munchkin back on, your Honor, and explain the same thing with respect to Munchkin?

Q THE COURT: Yes. All right.

A THE WITNESS: Now here, exactly the same. If I can control this thing --

Q THE COURT: Yes. All right.

A THE WITNESS: It simply goes back and forth and to the layman, the idea is it gives the continuity of getting from one side to the other.

Q THE COURT: I see. All right.

A THE WITNESS: The rhythm. It wraps around the back. Technically, all you simply do is take the coordinates here and place them in here.

Q THE COURT: All right. Thank you, Mr. Averett.

Q THE COURT: (Witness excused.) All right.

Q THE COURT: Your next witness. All right.

Q THE COURT: All right.

Go ahead.

THE COURT: Stand and be sworn.

RALPH STAUP,
called as a witness on behalf of the defendants, having been
first duly sworn, was examined and testified as follows:

THE COURT: Please be seated. State your full
name for the record and spell your last name.

THE WITNESS: Ralph William Staup, S-t-a-u-p.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Mr. Staup, will you please state your age and
residence.

A Thirty-seven years old. I live in Knoxville,
Tennessee.

Q Are you normally known by a nickname other than
Ralph William Staup?

A I am better known as Mike Staup.

Q What is your present employment, Mr. Staup?

A I work for North American Phillips.

THE COURT: Mr. Staup, that does not amplify your
voice. If you look straight in front of you --

THE WITNESS: I am sorry.

THE COURT: -- you will see a microphone that
amplifies your voice. That one only records, the
one on your left.

Go ahead.

BY THE WITNESS: Did you assume the responsibilities that you now have? I am employed by North American Phillips Consumer Electronics Company. I started out with Magnavox in a

BY MR. ANDERSON: as position.

Q What is your position?

A My job title is Director of Business Planning for Interactive Devices, and that means I am responsible for the preparation of the business plan and the product development for a couple of lines of business including the Odyssey brand video games and the lazer vision video disc players.

Q For how long have you held that position?

A This specific job title I have held for about six, or eight months. About at the same time I also assumed responsi-

Q And prior to that, were you employed by North American Phillips Consumer Electronics Corporation?

A Yes. Prior to February of this year, we were known as Magnavox Consumer Electronics Company, and there was an acquisition of some GT&E assets, and we formed a new company. That's the reason you hear us called as NAP and Magnavox.

Q Prior to February of 1981, were your responsibilities substantially the same as they were after the acquisition?

A Yes, essentially the same. The only difference now is that I need to plan products and business plans for four different brand names as opposed to one or two brand names, previously. Would you briefly trace your work experience and

history after receiving your MBA up until the time you joined Magnavox in 1974.

Q When did you assume the responsibilities that you now have?

A I graduated in December of '67, went to work for the IBM Company as a Marketing Trainee. I spent about three months being trained, and then I was inducted into the Army and spent two years, essentially, two years in the Army and came back to work for IBM, I think, in 1970.

A Essentially, I started out with Magnavox in a strategic planning position.

Q When was that?

A That was in 1974, June of 1974. After doing that for a year, I became the Project Leader for the lazer video

I assumed the position of Marketing in the computer disc system which was a new introduction of a new kind of Data Processing Division until I left IBM and joined Magnavox in 1974, June of '74. I did that for about two years doing the basic preparatory work for that.

Q How did you first become involved with the Odyssey program work?

Along the line, we decided to enter the video tape recorder business, and I also assumed responsibility for that,

A As I mentioned, I started out with responsibility and I think just about at the same time I also assumed responsibility for the video disc and then video tape recorders, and there had been another gentleman that had responsibility for Odyssey Odyssey programmable video game.

Q In about what year or when was that?

A That would have been, I think, in the fall of '77.

Q Will you briefly trace your education after high school.

A I have a BA and MBA from Michigan State University

in Marketing and some Ph. D. work in Management Science.

Q In what years did you obtain your BA and MBA?

A I receive my BA in June of 1966, and my MBA in

December of '67.

Q Would you briefly trace your work experience and

history after receiving your MBA up until the time you joined Magnavox in 1974. ~~place and continued to grow from that and~~

and
then A: I graduated in December of '67, /went to work for the IBM Company as a Marketing Trainee. I spent about three months being trained, and then I was inducted into the Army and spent two years, essentially, two years in the Army and came back to work for IBM, I think, in 1970. ~~It is essentially~~

~~how many~~ I assumed the position of Marketing in the computer Data Processing Division until I left IBM and joined Magnavox in 1974, June of '74. ~~the other aspect of the business is how~~

1 many Q: How did you first become involved with the Odyssey program work?

3 A: As I mentioned, I started out with responsibility for the video disc and then video tape recorders, and there had been another gentleman that had responsibility for Odyssey who left Magnavox and it seemed like a natural fit with my other products since they all hook up to a television set. We call them ancillary products.

19 Q: Can you just generally describe the nature of the home TV game business. ~~console substantially did just one game.~~

21 A: Well, the business is different, I think, in many respects from consumer electronics in the case of the Odyssey video game and I think -- or the consumer video game business, as we know it, the idea is to try to sell your system into the market business, both consoles and cartridges, and then

you try to establish a cartridge or -- excuse me -- a console base in the marketplace and continue to grow from that and then sell cartridges into that base. Sort of a little like the razor blade and razor business.

Q And when you refer to a console business or a cartridge base, what are you referring to as a base?

A A console base, as I would describe it, is essentially how many of your particular consoles are in place in consumers' hands. That is, how big a universe do you have to sell cartridges into, and the other aspect of the business is how many new consoles can you put in place along with cartridges in a given year.

Q Has Magnavox had a pattern of marketing cartridges over the years that you have been involved?

A Well, since I have been involved, the video game business was originally initiated, I think, in '71 or '72 by Magnavox, and it was then a very substantially different business.

It was a dedicated business. We call it dedicated chip days where each console substantially did just one game, and there was very little, little or no programmability aspect about it.

That was, I said, initiated by Magnavox and was a little like a roller coaster in terms of sales and profits, and I think that dedicated chip business peaked in 1975 and

1976, and a lot of people that were in that business got out of it, and then the business changed towards the programmable business, and that is a different business where you essentially sell a console and then the games are not infinite, but close to infinitely variable by offering new cartridges and new games on a continuing basis.

Q What has Odyssey's pattern of introducing new cartridges been over the years you have been involved?

A Well, we have always -- we introduced the main frame itself in the fall of -- the console in the fall of 1978. I think we had six cartridges at that point in time.

We have tried to maintain a pattern of introducing at least six new cartridges a year to maintain some momentum in the marketplace.

Q How does Odyssey endeavor to promote or advertise those cartridges? Is there any pattern to that?

A Well, up until about a year ago, we hadn't spent too much money advertising on a national basis, at least. Starting this year, we decided to put substantially more investment into the national advertising, advertising of the business, and what we have tried to do is feature cartridges as we go along in the spring of the year.

Our best cartridge, we felt at that point in time, was something called UFO which is a space game, and we tried to feature that one as much as possible although we did not

spend very much advertising money at that point in time.

Then in the summer months, we featured a cartridge called Quest for the Rings which is something we call a Master Strategy Series. It combines a board game along with the game cartridge itself, and we spent quite a bit of effort advertising that, and now we are into the peak advertising season which is, of course, the last three or four months of the year when probably 70 percent of our business is done.

Q Now we are featuring K. C. Munchkin, and we feel that's the best cartridge we have, best new one we have going right now.

Q What, if any, relationship have you found between the sale of a particular cartridge or game with respect to the sale of consoles or other cartridges?

A I don't know that we have ever been able to identify any specific pattern of business. The business is very seasonal so there is a high seasonal aspect to it.

The business is growing very rapidly so it's a high degree of growth so I can't say that we have any evidence that any one cartridge would affect sales that much.

Q With respect to the new cartridges, in general, that you introduced, whatever they are, what is the relationship of that to the sales of other cartridges and consoles?

A Well, in order to be viable in the business, we always felt we have to have a constant stream of new cartridges

coming on. The new cartridges, when they are introduced, will always sell significantly better and perhaps taper off as time goes on so if you don't bring on new cartridges, cartridge sales will suffer somewhat.

Also, main frame sales will suffer if you don't bring on new cartridges. The world gets the feeling that you are either going out of business or at least you are not a viable product compared to the competitors.

Q Approximately how many cartridges does Magnavox now offer for use with the Odyssey 2 console?

A I believe 33. I could be off by one or two.

MR. ANDERSON: I'll have the reporter mark as Defendants' Exhibit 20 a book entitled "The Excitement of a Game, The Mind of a Computer."

BY MR. ANDERSON:

Q Can you identify and describe that for us, Mr. Staup.

A Yes, sir. This looks like the kind of sale brochure that we would give out adjacent to where we sell Odyssey video games, and it would be a page or I believe two pages for each one of the cartridges that we offer at any point in time to go with the console. It would be a summary, I guess, on the last page which gives you the model number and the title of each of them by category.

Q That would be Page 67 of Defendants' Exhibit --

A I think 66 by my copy.

Yes, sir. I am sorry. There is 66 here and a 67 here.

Q 66 on the left-hand page and a 67 on the right-hand page?

A Yes, sir.

Q Unfortunately, your Xeroxed copy is two pages to a page.

A Oh, okay. I see.

Q I apologize for that, Mr. Staup.

Mr. Staup, when did you first meet Ed Averett?

A At the January Consumer Electronics Show, January, 1978 in Las Vegas.

Q Can you describe your special relationship with Ed Averett and professional relationship with Ed Averett?

A Well, Mr. Averett is an independent businessman whose business is designing game cartridges, and therefore, exclusively for the Odyssey system.

Q Have you ever seen the development system that he referred to that he has?

A Oh, yes.

Q Can you just briefly describe what your awareness is of that. What your involvement has been.

A Well, when he lived in California, it was a television set and something that looks like a computer terminal and some wire and disk drives and things sitting in his living room. I haven't seen it in his new house in Chattanooga yet.

Q When did you or Odyssey begin a business relationship with Mr. Averett?

A Well, the first meeting^{was} in January, 1978, the Consumer Electronics Show, Mr. Averett approached me and said he was interested in doing games for the Odyssey system. Now in that point in time, I have a lot of inquiries and a lot of people who approached me to do that, and I really don't take them very seriously because there's a big difference between having an idea and being able to make it into a real good playable game, but then Mr. Averett described his experience with Intel and with the particular chip set in the Odyssey 2, and also told me he had a specific Intel Development System in place in his home, at which point in time, I took him very much seriously and we made an arrangement that, essentially, said he would write a cartridge for me. On approval, I would either reject it or if I took it, I would pay him a royalty so we shook hands and essentially, have been doing business ever since.

Q When was the handshake? Do you recall?

A That was at the Consumer Electronics Show we made the handshake. I think he brought his first game in about six months later, and I looked at it, and I thought it was better than nothing and so we took it from him.

Q What was the nature of the game develop work at Odyssey at this time?

A It would be in the period of 1978, 1979. As I had previously mentioned, Magnavox, even though we originated the business and still hold the basic patents and rights to those, we had taken a roller coaster where we made substantial profits in one year and may have lost the same amount of profits in the next year, and we, essentially, in '78 and '79 were in a mode of trying to get out of the business.

I think in '78 and '79, we, essentially, eliminated our entire in-house staff for programming and engineering. At that point in time, Mr. Averett then became one of my key principals because I personally wanted to keep the business alive. I thought it had quite a future.

Q What games has Ed Averett introduced through Magnavox or through Odyssey since your first relationship and when?

A I am not sure I can name them. Out of 33 or 34 cartridges that we have, I think Ed and I did a count the other day and he has offered about 20 or 21 of the titles starting with Take the Money and Run, and up in through, I would say, essentially every release we had this year.

Q When did you introduce Take the Money and Run which is one of the exhibits here, Exhibit 15 and Manual 16?

A I am not exactly sure of the exact date. I do know that he did not get a paycheck in 1979 because it could have been either the fourth quarter of '79. He gets paid at

the end of the quarter or the first quarter of 19- -- excuse me -- last quarter of '78 or the first quarter of '79.

Q Just roughly, how many new cartridges has Magnavox introduced per year?

A Well, I would say we try to maintain a pattern of at least six. We felt six was necessary to maintain some presence in the marketplace, and we tried to spread them on an even basis throughout the year. This year, mainly due to the complexity of the games, they are getting much more difficult and much longer programs, so we have only been able to introduce five.

Q And of those five, do you recall how many were done by Ed Averett and his wife?

A Yes, they were all done -- the cartridges were all done by Averett. Two of the games were what I mentioned as Master Strategy games. They are a large package with an integral board, instruction book and a lot of playing pieces. It's sort of like combining a board game, Monopoly, with video action on the screen so there were other parties involved in the development of those games beside Mr. Averett, although, he did the specific game program itself.

Q How would you compare the games that Ed Averett has done for you with cartridges done by others as far as playability?

A Well, there are two ways to answer that question. One is others that have done that for me, I have used other

outside sources and his are significantly better, although, he went through a learning period. As I said, I wasn't exactly thrilled with his first game, but he has gotten progressively better as we have gone on.

I would say he is far and above, in my opinion, and I am somewhat biased but I think he is probably the foremost video game author in the country today. Certainly has more experience and has more titles in the marketplace than anybody else.

As opposed to the other systems on the market, either the Matel system or the Atari system, it would be difficult for me to judge because I don't know the complexity or the difficulty they have in programming their systems.

Q Can you describe how you first became involved in this K. C. Munchkin program.

A Well, yes. As Ed has mentioned, we were coming back from Europe after spending a week there, and we had a layover in the Atlanta airport, and as we usually do when we are together, we spent time talking about games and we went down and passed around the arcade to see what was new. We saw Pac-Man at that time.

Q And what were your respective reactions at that time?

A Well, I told Ed I kind of liked it, and Ed said that he thought it was dumb and there was nothing new.

Q And then what happened next, if anything, with

respect to your interest in Pac-Man or a game of your own?

A Well, we have a -- since Ed is sort of what we call a single stream, because he can't do two things at one time.

If he is working on a game, I can't really be troubling him to do a lot of other things.

He was working on a game at that point in time, and I think he finished up sometime in April. We see each other every two weeks so we probably talked every week on the phone, and we would have conversations. Usually, most of our conversation is, "Got any idea about what we do next" and we usually go through a list of whatever we thought was a good idea at the time. We may have five or six things, and just sort of bat them around, but we never make a decision until he is ready to start because it really doesn't make any sense to do it before then.

Q When happened then next with respect to the game that you saw, and Ed's comments on doing a better game?

A Well, specifically, regarding Pac-Man, sometime during one of these conversations it came up again. We discussed it, and I think the essence of the conversation, I can't recall specific words that we used, what they were, but it's probably not -- it would not be that good a game unless we had the name to go with it because some of the things that I thought were very attractive about Pac-Man, the compelling sounds which I think in many cases in the

arcades are more intriguing than the action itself, and you know, they are really not out of question in a home game and some of the detailed graphics and the cute things and so on and so forth, they really can't be done on our system in the home game so if we could get the registered trademark and rights to use the copyright, I thought it might be a worthwhile thing to do so sometime during the month of March.

I told Ed I was going to see if I could get the trademark, copyright for it, and I approached our in-house attorneys and asked them if they would try to accomplish that.

Q And during that period of time after March, did you keep in touch with Ed Averett and what he might be doing?

A Oh, yes. We talked on a very regular basis, specifically, regarding Pac-Man. He felt the same way I did about it. That probably it wouldn't be that good a game without the name.

MR. VITTUM: Objection, your Honor. He should testify to his own thoughts, not Mr. Averett's thoughts.

THE COURT: What difference does it make, really?

The objection is overruled.

Q Let's proceed.

BY THE WITNESS:

A I am sorry. You better repeat the question again for me.

BY MR. ANDERSON:

Q I asked about your discussions and conversations

with Ed Averett, and what he was doing while you were working in the area ascertaining a license for Pac-Man.

A Well, Ed said that he really -- well, a couple things about Ed. First of all, he considers himself to be the foremost professional in his field so it's very difficult to tell Ed what to do, and I don't try to. You know, he is independently wealthy at this point in his life and so I don't try to tell him what to do.

On the other hand, he said, "If you can get the name Pac-Man, I will try to do it for you," but he said, "I have got some ideas that would make a much better game," and I asked him to describe them to me. He did, and this was on the phone.

A I told him that I thought it was kind of dumb, but he said what he often says to me. "Trust me," and I said, "Okay." He said he was going to proceed on it, and I don't think that we did much or conversed much about it for quite some time. Probably not until June at the -- I think when we met, personally, in person at the Consumer Electronics Show in Chicago.

Q At that time, had you heard anything further with respect to a Pac-Man license?

A No, I had consulted our attorneys about every couple weeks, and their response to me was they couldn't get a return call from Midway.

Q Did they finally advise you with respect to whether a license was available?

A It was sometime after the Consumer Electronics Show because I remember at the show talking to our in-house copy-right lawyer, and he said he still had not gotten anything, but he said he would press ahead because Mr. Averett, I couldn't have him standing idle. He is my most valuable resource, and I had to do something one way or the other.

I think it was about two weeks later, about the middle of June that our in-house attorney got back to me with the fact that it was not available, the trademark or the copy-right.

Q Did you report that to Ed?

A Yes.

Q And what was his reaction to that?

A He was absolutely delighted because had we got the game, he would have had to do some substantial backing up and starting over again.

Q And at that point in time, what was the status of Ed's work on his own game?

A I don't really know at that point in time. He told me that within a month that he would be able to finish up what he was doing and give me a first look at it, and I think he promised the middle of July sometime.

Q And what followed that?

A He came in the middle of July with an initial look at the concept which was the moving dot and initial look at the main character, K. C. Munchkin, and none of the other play action or anything else was done at that point in time, but enough that I looked at it at that point in time. The moving dots made some sense to me, I could easily see how that could be transformed into something worthwhile.

Q What happened next in your program?

A I think at that point in time, probably nothing. I think I said that was very nice. I probably talked about it a little bit, told him we needed sound because he had no sound at that point in time, and he went back and worked for about another month.

Staup - direct

Q And then what? Did he bring something to you?

A Yes, he brought back a completed game in about the middle of August, I believe, and we had a review on it, looked at it, a critique, if you will with myself and other people. I usually ask them to take a look at things, and we decided it looked like an awfully good game, and we ought to go ahead with it.

We would go through a period of a couple weeks of intensive testing. That's usually giving a lot of copies to the engineers and asking them to find errors, faults or whatever.

Q And were any changes made in the game after that?

A Yes. Not really, because of the playability aspect of it. The business, to my way of thinking at least, had somewhat taken a turn around April, May sometime. We had been making cartridges for three or four years now, and then we became aware in the trade of the magazines and publications for something called audio-visual expression which is sort of a new term for us at Magnavox or at N.A.P. and so we read, in fact, I read and sent Ed some of the early decisions or whatever legal people call things on some of the copyright cases that have been held so I consulted with our inside attorneys at that point in time to make sure that we weren't doing anything that could be considered illegal and immoral, unethical or whatever.

Staup - direct

Q What happened as a result of that?

A Our attorneys came in, and we spent an entire day and night reviewing the subject, every aspect we could think of, and we went through the play of the game, as we have here, with our inside attorneys and the result was that we had no problem with the playability of it. That did not seem to be a problem to anybody that spent a lot of time playing. It was a totally different game in concept of how it played, how it felt, how you got into it and your relationship with the characters.

We did have one concern that the characters were similar enough to the Pac-Man characters that we could -- we felt we would be offensive to the Midway people so we backed up and spent a couple of days trying to make as much change of those characters as we possibly could. I think, as I -- as we discussed, we should give them the constraints of the system, working in an 8 by 8 or 64-dot matrix to make the characters as different from the Midway characters as we possibly could without losing the concept.

Q Is that what you did?

A Yes, sir, we did.

Q And are those the characters that now appear on the screen with the K. C. Munchkin cartridge?

A Yes, sir.

Q Exhibit 17?

A Yes, sir. Not right now because you have to restart it.

Q How did Odyssey arrive at the name of the characters that are employed in K. C. Munchkin?

A Well, as I said, we had gone through various aspects of the game, and we looked at the playability and decided that was a very neat concept and we had made changes to the characters that we felt that we were unique to our system.

The third thing, on the advice of counsel, was that whatever we do, we should not in any way, shape or form suggest to anybody that this is Pac-Man. We should find a totally unique concept that doesn't rhyme with, sound like, suggest in any way Pac-Man so we went through our standard procedure of trying to generate a list of as many words as we can think of and send them to our lawyers for copyright clearance, and then try to pick something that made some sense to us.

In the process of that, one of the names was Munchkin which is probably suggestive of the Wizard of Oz to most people, but that at least to me did have a feel. We wanted to make a very unique character, something you can like, somebody you can love, somebody totally distinctive and really in the matter of

Staup - direct

discussing it with Ken Makin, who is the president of the company, I jokingly suggested we are going to call it K. C. Munchkin and make it his namesake which was a joke, and in time, however, after thinking it over and really testing that name on a lot of people, we liked it. People I tried it on said, "I have no idea what it is, but it's cute and I will take a look at it," and I called Mr. Makin, I think, in Florida because I didn't want to go ahead with that name without really asking the president of the company if I could use it, and he said, "Fine. If it helps, go ahead."

Q Did Odyssey do anything else at the time of introduction of K. C. Munchkin to make certain the K. C. Munchkin identification was put forward uniformly and singly?

A Well, as I said, up until the middle of June, we were attempting to get the use of the trademark Pac-Man and having failed, there was some concern that internally within the Magnavox Company, we might have used the word and people would get confused so we did send a letter to our dealers, I believe, that said, in essence, that K. C. Munchkin is a unique game. It's a game in its own rights and please do not confuse it with anybody else's mark or name.

Q I will hand you a copy of a document that's

Staup - direct

been marked Defendants' Exhibit 21, a memorandum dated October 27, 1981.

Can you identify that, please.

A Yes, this is the memo I was just talking about.

Q And as far as you and the management of Odyssey are concerned, did this go out to the addressees indicated on Defendants' Exhibit 21?

A Yes, sir.

Q Did you do anything else at that time or did Odyssey do anything else at that time to ensure the unique character of K. C. Munchkin as an identification?

A Well, I will back up a little bit. Not at this time, but back in, I would say, late August when we launched this program, I had a meeting of everybody internally within N.A.P., and as well, I think Mr. Averett, and I think that's it.

Specifically, I explained to them that this was a unique game. That I didn't want anybody to confuse this with Pac-Man in their vendor's relationship or purchasing relationship with vendors, with manufacturing people, the relationship with manufacturing people, with any of the advertising art work or anything else. This was a unique game, and "Let's not make that confusion."

Q With respect to Magnavox personnel, what was the result of that effort?

Staup - direct

A Well, as far as I know, it was respected. I am certain that there would have been a great deal of upset on the part of me or anybody else had anything been done to go against these wishes.

Q Do you know of any Magnavox or Odyssey personnel or any Odyssey action that did not conform to those instructions that you gave?

A No, sir.

Q With respect to customers of Magnavox, what was done and what was the result?

A You are talking about customers in terms of field, dealers or the --

Q The dealers, dealers, Mr. Staup.

A There was another letter that was sent out to the trade. This letter, incidentally, went to our field people, our division sales managers and regional managers. There was, apparently, an incident in Chicago where an independent dealer made reference in the same ad comparing Pac-Man to K. C. Munchkin, and I think that dealer was part of the suit. I am not entirely certain, but immediately following that, there was another letter sent directly to each one of our dealers saying specifically that this is not to be done. That it was a violation of Midway's trademark, and it reinforced the message that we sent to our field salesmen, some two or three weeks earlier.

Q I will hand you Defendants' Exhibit 22, a letter dated November 20, 1981 and ask you if you can identify that for us, Mr. Staup.

A Yes, this is the letter.

Q Mr. Staup, how many dealers does Odyssey have for electronic games, approximately?

A Slightly over 5,000. At least there were slightly over 5,000 when this letter was mailed.

Q Mr. Staup, in your testimony a little while back, you referred to a console base in the industry, and you referred to that as the consoles that you have in the field, I believe?

A Yes, sir.

Q Just from your experience and knowledge in the field, how does the Atari console base compare to the Odyssey console base?

A Well, exact figures, I am not sure I have. My estimation is that at the end of this year, the Atari base will probably be on the order of perhaps ten times as large as the Odyssey base.

Q Now I think we have had testimony on this, but can anyone buy a K. C. Munchkin cartridge and use it with one of those Atari consoles?

A No, sir.

Q And conversely, if Atari sells a cartridge

Staup - direct

for their console, could that be used in an Odyssey console?

A No, sir.

Q Mr. Staup, if North American Phillips Consumer Electronics Corporation, the defendant here, is prevented from selling its K. C. Munchkin product at this time, what effect would that have on Odyssey's profit and loss, in your opinion?

A Yes. About a week ago, in fact, or last Wednesday we prepared some figures in our accounting department, and our estimate is that in 1981, that is the months of November and December, if we were to lose the K. C. cartridge it would, the total damage to us would be on the order of \$5 million. If we were to lose it into 1982, we would add another \$3 million. Now that specifically is regarding the K. C. Munchkin cartridge itself.

We would also estimate there would be further damage to our business due to lack of momentum in that we brought out five cartridges here, and you would take away one of our better selling ones right at the peak sales time. We would estimate that would cost us an initial \$300,000 in lost business this year, and an additional \$5 million next year in lost business.

Q Does Odyssey advertise the K. C. Munchkin cartridge in combination with consoles and other cartridges? I mean, in the same piece, in the same advertising piece?

Staup - direct

A Yes. I am not sure how to answer that question exactly, but we have spent a significant amount of advertising dollars specifically directed towards the K. C. Munchkin cartridge. Now there may be mentions of other cartridges also available for Odyssey. We usually try to list the other 33 or 34 along with it just to show the variety of cartridges.

Q With respect to the number of dollars that you referred to in your last few answers and the damages that Odyssey would suffer, can you just by subject matter break down what categories of work or effort or material are involved in coming up with that figure.

A Yes, in 1981, specifically regarding the K. C. Munchkin cartridge, we would estimate \$2 million in lost profits, a \$1,800,000 in scrappage of finished goods or raw materials on order and \$1,200,000 in advertising that has been placed specifically directed towards the K. C. Munchkin cartridge.

Q Are there production expenses involved in there, too?

A Yes, sir.

Q Are they in one of those figures?

A Yes, I have lumped them in with the advertising figures.

Q What, if any, effect would the elimination of

Staup - direct

the K. C. Munchkin cartridge have on the sale of consoles, in your opinion?

A Well, as I say, to take away one of the five in cartridges that we introduced this year which would be 20 percent of our new introductions, plus our latest one and the one that is being featured in our advertising currently, I think it would have a substantial effect on our sales. If not right at the moment, but certainly near the end of this year and going into the following year.

Q Can you explain whether that effect is because of the nature and play of K. C. Munchkin as a game or as some other -- as a result of some other factor?

A K. C. Munchkin is a good game, but I would say if you took any one of our -- any cartridge that we are featuring right at this particular time away from us, it would have the same or similar effect. Whether it be Quest of the Rings or U.F.O. or Alien Invaders or any of them.

Q Mr. Staup, from your experience in the home video game industry, what, if any, would be the effect of the sales of K. C. Munchkin cartridges on Atari's ability to sell a Pac-Man game if they come out with one next year?

MR. VITUM: Objection, your Honor. I don't know that this witness is qualified to testify to

Staup - direct

the effect on Atari's sales.

THE COURT: What about that, Mr. Anderson?

MR. ANDERSON: Mr. Staup has wide experience in the industry, your Honor.

THE COURT: Does he know anything about Atari?

That's the reason for the objection. I suppose that

the plaintiff concedes Mr. Staup's knowledge about

North American Phillips, is that the point?

MR. VITUM: That's right. He has already

testified he can't speak to Atari.

THE COURT: I will sustain the objection. You

can ask Mr. Staup some more questions. Maybe you can

establish that he has personal knowledge, and if he

knows, but I will sustain the objection on the ground

that it's put.

BY MR. ANDERSON:

Q Mr. Staup, in the time that Odyssey has been selling cartridges for its programmable console, have its competitors ever come out with a similar game to one that Odyssey had in its mind?

A Yes, sir.

Q And in your judgment, what impact, if any, did the introduction of the same game have on Odyssey's ability to sell its cartridges?

A I think the best example of that would be

Staup - direct

just about a year ago the most popular concept going a year ago was the Space Invaders type of concept which Atari, I think, said in their annual report that it was the best selling video game cartridge of all time. It sold over one million cartridges last year.

We came out with a game that was very similar in concept in November of last year called Alien Invaders Plus, and I think due to the advertising and promotion that Atari had done on Space Invaders, our cartridge was, essentially, pre-sold and that was the biggest introduction of a cartridge we had ever had. That's our leading seller at this point in time.

Q Mr. Staup, you were here for the testimony on Wednesday and heard the testimony about Minnesota Fats advertising here in Chicago.

A I would like to show you a Minnesota Fats advertisement from the Chicago Sun-Times for Saturday, November 28, 1981 which has been marked Defendants' Exhibit 23 and point your attention to the references in there to the various TV consoles and games.

Have you seen this advertisement at any time before?

A I don't believe so, sir.

Q With respect to the reference in the center column, the bottom of the page to the video game cartridge

Staup - direct

headquarters, do you see that, sir?

A Yes, sir.

Q There is a reference to Atari first and several games, and then Odyssey.

A Do you see that?

A Yes, sir.

Q Now are those three game cartridges that Odyssey now sells?

A Yes, sir, they are three new introductions this year.

Q And with respect to the console shown in the left-hand side of the page labeled "Challenge someone this Christmas with an Odyssey," is that the console that we have here in the courtroom, do you know, Exhibit 2?

A Yes, sir.

Q Mr. Staup, does Odyssey have any advertising allowance relationship with its customers? Do you know?

A Yes, sir. We -- I think it's a standard practice in the industry. We will allow a dealer a percentage of his purchases from us to be used in what we call co-op advertising.

Essentially, the way that usually works is that if he will put in a certain amount of money, we will put in a certain amount of matching funds up to a certain amount of sales. Let's say, two, three, four percent

Staup - direct
- cross
of sales to be used for local advertising.

Q You know of your own knowledge whether there is such a relationship with Minnesota Fats as to the sale of cartridges or consoles of Odyssey?

A No, I don't know that, sir.

MR. ANDERSON: No further direct examination.

THE COURT: Cross examination.

MR. VITTUM: Thank you, your Honor.

MR. ANDERSON: Your Honor, if I may, I will offer into evidence and I am sorry that I neglected to do it, but the new exhibits that we have identified with Mr. Staup --

THE COURT: 20 to 23, inclusive.

MR. ANDERSON: Yes, your Honor.

THE COURT: Any objection?

MR. VITTUM: No objection, your Honor.

THE COURT: They are admitted into evidence.

(Whereupon said Defendants' Exhibits 20 to 23 inclusive were admitted into evidence.)

CROSS EXAMINATION

BY MR. VITTUM:

Q Again, I would like to see, Mr. Staup, if I have the correct understanding of the sequence of events that occurred at the time when you and Mr. Averett passed through the Atlanta airport and saw the Pac-Man game there

and watched it being played.

Was this February of 1981?

A Yes, sir. It's on or about the 1st because that's when we came back from Europe.

Q And later on that spring, you and Mr. Averett had a conversation or series of conversations out of which evolved the project that led to the game that we now know as K. C. Munchkin, is that correct?

A Yes, sir.

Q And at that same time, you, through the legal officers or officials of the defendant North American Phillips were undertaking to find out whether a license to the Pac-Man, a copyright and trademark might be available from Midway, is that correct?

A Yes, sir.

Q And then, that essentially takes us up to at least the time of the consumer electronics show in June, I believe, when you indicated that sort of triggered a reminder that you should have your legal people find out once and for all what the situation was with the license, and shortly after that, you found out that the license was not available to Magnavox, is that right?

A Yes, sir.

Q And then very shortly thereafter, Mr. Staup came in with his preliminary concept of this game that

Staup - cross

he had been working on, and you went over that, and then he went back and came back a month later, I believe you said.

THE COURT: You said Mr. Staup.

MR. VITTUM: I am sorry, Mr. Averett. Let me rephrase the question so I am not confusing him.

BY MR. VITTUM: So a very short time after you had found out about the unavailability of the license, Mr. Averett came in with his preliminary concept, and you reviewed it, and you went back and came back, I believe you said, a month later in mid-August with his final design of the game, is that the correct sequence?

A Yes, sir.

Q And it was at that point then that Mr. Averett was instructed to make some changes in the appearance of characters in order that they wouldn't look like the Pac-Man characters, is that right?

A Yes, sir.

Q And Mr. Averett's testimony, he indicated that one of the changes was to change the color of the Pac-Man character from yellow to the bluish version that appears in the K. C. Munchkin game, is that right?

A Yes, sir.

Q What other appearance changes was Mr. Averett

Staup - cross

instructed to make in the characters of the K. C. Munchkin game to make them look more different from the characters of the Pac-Man game?

A Well, the only instructions that were given is to make them as far away from the Midway characters as we possibly can without losing the concept at which point in time, he retired to his home, and I think he and his wife, Linda, worked on it for a couple of days.

Q In a couple of days, they have what is now the version of what we see on the screen for the K. C. Munchkin game, is that correct?

A Yes, sir.

Q You indicated also then that North American Phillips undertook some further review in consultation and instructions with your people in-house concerning the importance of respecting trademarks and not involving the Pac-Man name in any case, and you indicated that Defendants' Exhibit 21, the October 27, 1981 memorandum was circulated as a result of that review, is that correct?

A No, sir. I don't think that was circulated as a result of that review.

Q I am sorry.

A That probably was different channels.

Q But that was also based on the same concern that someone in your organization might misuse the

Staup - cross

1 Pac-Man name in relation to the K. C. Munchkin game, isn't
2 that right?

3 A That memorandum, in fact, both of them were
4 initiated from our legal department. I am not sure exactly
5 why they did it, but I guess you are probably right.

6 Q Defendants' Exhibit 21, it doesn't specifically
7 refer to the Pac-Man trademark, is that right?

8 A That's correct.

9 Q But the Pac-Man trademark is the only one you
10 knew about that North American was concerned about in
11 relation to this project, wasn't it?

12 A Yes, as far as I was concerned.

13 Q Is the circulation, Mr. Staup, of a memorandum
14 such as Defendants' Exhibit 21, a standard procedure that
15 North American Phillips undertakes each time you bring out
16 a new cartridge?

17 A No, sir.

18 Q Defendants' Exhibit 21 was only circulated
19 internally in the North American Phillips organization, is
20 that correct?

21 A Yes, sir.

22 Q This one, Defendants' Exhibit 21, did not go to
23 dealers, correct?

24 A That's correct.

25 Q Defendants' Exhibit 22 which was sent out after

Staup - cross

1 the lawsuit was filed is the one the went to dealers, is
2 that right?

3 A That's correct.

4 Q You indicated in describing the advertising program
5 that has been followed that from time to time, basically,
6 on a seasonal basis you feature particular cartridges in
7 your advertising, is that right?

8 A Yes, sir.

9 Q And you mentioned that there was a cartridge that
10 you featured last spring, I think, U.F.O. in Space, is that
11 right?

12 A U.F.O., yes, sir.

13 Q You indicated not very much money was put in
14 that project, is that right?

15 A Yes, sir.

16 Q Is that because of the seasonal character of
17 the business for these products?

18 A Yes, sir.

19 Q So that the cartridge that you are featuring now
20 during the Christmas season is the one which you would put
21 a major advertising expenditure behind because of the
22 importance of the Christmas market, is that right?

23 A Yes, sir.

24 Q Your policy of featuring particular cartridges
25 along with the Odyssey II console is designed to show

the consumer an attractive game that can be played in the hopes that the consumer will be encouraged to buy the Odyssey console, isn't that right?

A Yes, sir.

Q And once the consumer has bought the Odyssey II console, you, in effect, have the consumer as your base for sales of other cartridges, isn't that right?

A Yes, sir.

Q And Atari or some other cartridge manufacturer will have, in effect, lost that consumer for future sales of its cartridges once they have the Odyssey console, isn't that right?

A I think, generally speaking, that's correct.

Q It's a policy of the defendant North American to protect its video games by copyright just like Atari and Midway does, isn't that right?

A Yes, sir.

Q Let's see. I believe you indicated that you do have other new cartridges this year in addition to K. C. Munchkin.

A I wonder if you might just list what they are so we know what they are.

A They are five. The two in a master strategy series called Quest for the Rings and Conquest of the World, and three in our Challenger Series called Monkeyshines,

Staup - cross

K. C. Munchkin and U.F.O. cartridges for the Rings and the U.F.O. Quest. So that you would still have, even if you were prevented from marketing K. C. Munchkin, you would have the Quest for the Rings and Conquest of the World, Monkeyshines and the U.F.O. cartridges, is that right?

A Yes, sir. I don't understand the question.

Q And then, of course, you would have all the other 33 Odyssey cartridges that are shown in the little booklet that lists all of them, isn't that right?

A Are there 33 others? The Quest for the Rings

cartridge. I believe that was what you said. The Odyssey

advertiser. Take away five, and then that would give me -- all the others would be 5 from 32, right?

Q I see. The cartridges you would still have even

if you were selling K. C. Munchkin, isn't

that right? But K. C. Munchkin is not listed in that booklet, is it, sir? Yes, sir.

A I don't believe so, no. The selection of the K. C.

Munchkin. So it wouldn't be five subtracted, it would be four. Or something to that effect.

A Okay. You are right. The cartridges that you

said, Q But you would have all those other cartridges to sell to your base of consumers who had the Odyssey II console, isn't that right?

A Yes, sir.

Staup - cross

Q Incidentally, the Quest for the Rings and the U.F.O. cartridges which are new cartridges in your series this year, they just happen to be the ones that you featured during your advertising during the spring and the summer season, isn't that right?

A I am sorry. I don't understand the question.

Q I believe in your direct testimony you indicated that last spring you featured the U.F.O in Space cartridge?

A U.F.O., yes, sir.

Q And that last summer the Quest for the Rings cartridge was the one that you featured in your Odyssey advertising?

A Yes, sir.

Q And those cartridges you would still have even if you were prevented from selling K. C. Munchkin, isn't that right?

A Yes, sir.

Q You indicated that in the selection of the K. C. Munchkin game, that you went through your usual search for names or something to that effect.

I don't mean to mischaracterize what you said, but could you describe in a little more detail exactly what you did to develop the K. C. Munchkin game name.

A The name?

Q The name, yes.

A Well, I think, essentially, what we did and I think actually I was out of town when this happened, but my assistant got a bunch of people in the room and asked for a brainstorming session and ended up with a sheet of paper with eight or ten names on it just off the top of the head, and I think they narrowed that down to a half a dozen that were reasonable.

Q Were you aware at that time that the word "munchkin" or the munching concept had been associated with the Pac-Man game by the plaintiff Midway, and I show you in this connection, Plaintiffs' Exhibit 4 in evidence, which in the text indicates that the action of the Pac-Man goes about the maze, and I will quote "scoring points by munching up the dots in his path."

Were you aware of that?

A No, sir.

Q I would like to go to your testimony on direct, sir, concerning the impact of an injunction and the \$5 million figure.

First of all, \$5 million was a figure, I believe I am correct, that you associated with the months of November and December, 1981, is that correct?

A Yes, sir.

Q And your testimony was that if the injunction

were to extend in and to control 1982, there would only be an additional \$3 million of impact, isn't that right?

A Yes, sir.

Q Am I correct, therefore, in concluding that the Christmas marketing season is overwhelmingly important to the marketing of these kinds of games from a dollars and cents standpoint?

A Yes, that is. I am not sure what you mean to imply here. It has to do with these figures.

Q I would like your testimony on a yes or no.

A Yes, sir.

Q Now you referred to a 1.2 million dollars in advertising, and I guess you also included something called "pre-production" in that figure, but a million point two in advertising placements.

A Well Does that include television advertising, sir?

A No, sir.

Q All print?

A Yes, sir.

Q Do you include advertising allowances given to local retailers in that figure or is that only --

A Yes, there is a certain amount of co-op advertising included there. I think the number is \$300,000.

Q So that it would be correct to say then the

Magnavox advertising figure is only \$900,000 excluding the retailer co-op?

A It -- there is a million two comes out of our pocket.

Q But the advertising that you place in print, media, involving the K. C. Munchkin game is only \$900,000, is that right?

A That we actually place, yes, but we pay for the entire million two.

Q I understand that.

A Okay.

Q I understand that.

Q Go to the figure of 1.8 million in what you have referred to as scrapped goods. Can you describe what the scrapped goods are?

A Well, that would be, and I guess I am presuming exactly what an injunction would cover here, but if it were to cover retrieving everything that we could from the field that had already been shipped to our dealers, plus finished goods inventoried as of last Friday, not this previous Friday but the Friday before that, as well as raw materials in the form of ROMs, read-only memories, the computer-related component, instruction book, cartons, cases that are either on hand in our manufacturing facility or delivery in the months of December and January with our

vendors.

Q So some of these expenses that you have included in scrapped goods would include materials that are currently on order for future delivery which there would be some opportunity for you to either cancel or to shift to orders for materials for other cartridges, for example, isn't that right?

A Anything that's within six weeks, I would doubt that we would be able to salvage. Essentially, that close in, if they are on order, we bought them.

Q But there is certainly the possibility of inquiring of your vendors to see if there couldn't be a shift, isn't that right?

A Yes, sir.

MR. VITTUM: May I have just one moment, your Honor.

THE COURT: Surely.

BY MR. VITTUM: I would say these are probably either

Q I show the witness a copy of the page 7 from part IX of Thursday, November 26, 1981 edition of the Los Angeles Times which appears to have a K. C. Munchkin game cartridge advertisement.

MR. VITTUM: I will let counsel take a look at it.

THE COURT: What is the exhibit number of that

Q. one?

MR. VITTUM: Plaintiffs' Exhibit 20 for identification, your Honor.

THE COURT: All right.

MR. VITTUM: I have two other ones that I previously numbered. I am going to come back to those.

BY MR. VITTUM:

Q Now, Mr. Staup, I will show you Plaintiffs' Exhibit 20 for identification and ask you if that is an advertisement with which you are familiar or if you are familiar with the text or portions of that that may have been supplied by defendant to a retailer that placed the ad?

A I am not familiar with the ad. I am not really familiar if that's the text that we supplied them.

Q But the graphics that appear in that ad appear to be similar to the graphics that were used in the North American ad that's Plaintiffs' Exhibit 6, is that correct?

A Yes, sir, I would say these are probably either from that or the instruction book.

Q Now to perhaps put your mind at ease, I don't find the Pac-Man trademark used anywhere in this ad, but what I did find is the phrase, and I quote: "It's the popular arcade game you can now play on your own TV."

Mr. Staup, what is the popular arcade game that's referred to in that advertisement for the

Staup - cross

1 K. C. Munchkin cartridge?

2 A I don't know.

3 Q You certainly don't know of any game other than
4 Pac-Man that that might refer to, do you?

5 A I would assume they are referring to K. C. Munchkin
6 in that ad, but --

7 Q Is K. C. Munchkin an arcade game?

8 A Yes, sir.

9 Q I wasn't aware of that fact. Could you describe
10 wherein it is an arcade game?

11 A We list it in our instruction book, the -- I am
12 not sure what exhibit this is. We break our games down
13 by categories, sports games, or arcade games, educational
14 games, master strategy games and challenger series games.
15 We have always done that.

16 Q But there is not an arcade game anywhere in the
17 world where K. C. Munchkin is played, is there?

18 A Well, what is the definition of arcade? In
19 our parlance, arcade is one that generally has black
20 backgrounds and a lot of shoot them up and is like the
21 things that are played in the arcades.

22 MR. VITTUM: No further questions, your Honor.

23 THE COURT: Any other question of Mr. Staup?

24 MR. VITTUM: Plaintiffs offer Exhibit 20 for

25 identification.

Staup - cross
- redirect

1 THE COURT: Any objection to Exhibit 20 for the
2 plaintiffs being admitted into evidence, Mr. Anderson?
3 That's the New York Times, November 26, 19 --

4 MR. VITTUM: Los Angeles Times.

5 THE COURT: I am sorry. The Los Angeles Times.
6 I couldn't even read my own notes. It's a Los Angeles
7 Times' ad.

8 MR. ANDERSON: I have never seen it before just
9 now, but I presume it's what he says it is. I don't
10 being object.

11 THE COURT: All right. It is admitted into
12 evidence.

13 (Whereupon said Plaintiffs' Exhibit 20
14 was admitted into evidence.)

15 MR. VITTUM: Would the Court like to see our
16 photocopies? They are not very good.

17 THE COURT: That's all right. I think I know what
18 it says.

19 All right. Redirect.

20 REDIRECT EXAMINATION

21 BY MR. ANDERSON: Sir,

22 Q Mr. Staup, can you put Defendants' Exhibit 20 in
23 front of you, the catalog of games.

24 A Yes, sir.

25 Q And can you turn in Defendants' Exhibit 20 to

Staup - redirect

1 the catalog of games, the pages that you have previously
2 discussed, page 67.

3 A Yes, sir.

4 Q Now with respect to the list of games on page 67,
5 can you explain what Odyssey is doing there and what they
6 are representing.

7 A If you are talking in terms of the list of the --

8 Q The breakdown.

9 A Yes. Well, we tried to position Odyssey as
10 being more versatile than our competitors, and we think
11 we can do more kinds of cartridges than our competitors
12 so in order to do this, we have broken our cartridges
13 down into categories.

14 For example, the educational and master
15 strategy series are really, many of them, unique with us
16 because we have a keyboard and our competitors, essentially,
17 don't.

18 Q And with respect to the category of games listed
19 in your Odyssey catalog, Defendants' Exhibit 20, there
20 is a category called "Arcade Games"?

21 A Yes, sir.

22 Q And did you indicate that K. C. Munchkin is in
23 that category in Odyssey's classifications?

24 A It probably is, although, I see it's not in
25 the book yet.

Staup - redirect
- recross

1 Q Now you testified with respect, on direct, to
2 an estimate of \$5 million in damages if Odyssey were
3 prevented from continuing to sell K. C. Munchkin, is that
4 correct?

5 A Yes, sir.

6 Q And are those -- also, in my notes, it's
7 indicated you indicated that that 5 million figure was not
8 all the result of lost sales that would result in 1981,
9 but some other additional factors, is that correct?

10 A I am sorry.

11 Q My notes indicate that your figure of \$5 million
12 lost or damages in 1981 would not be just solely the result
13 of a lost profit in sales in 1981, but included other
14 factors?

15 A Yes. The majority of it would be other factors.

16 Q Including scrappage, advertising and things of
17 that kind?

18 A Yes, sir.

19 MR. ANDERSON: No further redirect.

20 MR. VITTUM: Just one question.

21 RECROSS EXAMINATION

22 BY MR. VITTUM:

23 Q On scrappage, Mr. Staup, it is true, is it not
24 that if K. C. Munchkin cartridges were simply impounded
25 or put in a warehouse rather than scrapped, it would

Staup - recross
- redirect

ultimately be able to sell them if the injunction were lifted at some point in the future, isn't that right?

A It would probably depend on what point in the future. The games business has a lifetime.

MR. VITTUM: Thank you.

THE COURT: Thank you.

THE REDIRECT EXAMINATION

BY MR. ANDERSON:

Q May I have you, Mr. Staup, explain what is the lifetime of a game, and how would that figure in your testimony.

A Well, several aspects of it. One is that the current mainframes that we have now are about five or six years old, and I expect that new mainframes will come along sometime in the future and replace these and make them obsolete so these consoles will no longer be the things that are primarily sold in the marketplace.

Q Are you speaking in terms of a year or two or can you be --

A My estimate is that Atari will introduce a new console in 1983. It's an estimate on my part.

MR. ANDERSON: No further redirect, your Honor.

THE COURT: Any further questions of Mr. Staup?

MR. VITTUM: No, sir.

THE COURT: Thank you. Your next witness.

Giese - direct

(Witness excused.)

MR. ANDERSON: We would like to call Mr. Ronald Giese to the stand.

RONALD E. GIESE, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated, please. State your full name for the record and spell your last name. Lean forward and speak directly into that microphone, and keep your voice up.

THE WITNESS: Ronald E. Giese, G-i-e-s-e.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Mr. Giese, will you state your age and home address, please.

A 38 years old, resident of Mt. Prospect, Illinois.

Q By whom are you employed?

A North American Phillips Corporation.

Q And what is your position with North American Phillips?

A I am division general manager of the Magnavox Company for the midwest division.

Q And are you employed by the North American Phillips Consumer Electronics Corporation?

A Yes, I am.

Giese - direct

1 Q What is the Great Plains Division?

2 A The Great Plains Division encompasses nine states
3 throughout the midwest encompassing Wisconsin, Illinois,
4 North Dakota, South Dakota, Minnesota, Nebraska, parts of
5 Washington, parts of Kentucky and Indiana.

6 MR. VITTUM: Excuse me, your Honor. I have got
7 a chair that's squeaking, and it's distracting me.
8 I hope it's not distracting anybody else.

9 THE COURT: All right.

10 BY MR. ANDERSON:

11 Q Mr. Giese, will you describe your duties and
12 responsibilities as division general manager.

13 A It involves the complete marketing of Magnavox
14 products throughout the Great Plains Division, and also
15 the responsibility of franchising new accounts, and I have
16 one sales manager and 24 regional managers indirectly
17 reporting to me.

18 Q Do you have -- you say one senior manager?

19 A There is one sales manager and two senior regional
20 managers, and 21 regional managers. Excuse me.

21 The two senior regional managers are what
22 we refer to as our sales department. They are the key
23 men we have in our organization. One is located here in
24 the City of Chicago by the name of Tom Slipbrac, and the
25 other gentleman is Don Mullins located in the State of

Missouri. There was no reference in that letter,

Q Do you meet regularly with the sales manager and regional managers that report to you?

A We get together at this time of the year. There's a general meeting every Monday morning to review what is going on in the marketplace. We review our competitive situation where we are at, what advertising events are taking place in the market. This is the same as

Q Have you been meeting regularly in the last month or two on that basis?

A We started meeting, approximately, the first week in -- excuse me -- the first week in October, end of September, somewhere in that period of time. There is a total of seven regional managers in the City of Chicago. My sales manager, myself and our merchandising service at the administrator are/ meetings on Monday morning.

They last about an hour and a half to two hours. My secretary has been instructed to date stamp

Q Do you have any recollection of receiving a memorandum in late October regarding the name of and the use of the name K.C. Munchkin on Odyssey's video game?

A There was a letter that was received, and I can't recall the date of it offhand, but there was a letter that was received that indicated that the game K. C. Munchkin should not be referred to as anything other than

Giese - direct

1 K. C. Munchkin. There was no reference in that letter,
2 as I recall, to any other cartridge name or -- subsequently

3 Q I will hand you Defendants' Exhibit 24, Mr. Giese.

4 A Can you identify that, please. to the

5 A Yes, it's a letter that was sent to me as
6 division general manager on October 27 from our legal
7 counsel, Mr. Tom Hafner.

8 MR. VITTUM: Excuse me. This is the same as
9 Defendants' Exhibit 21 except it has his receipt stamp.

10 Is that the only difference?

11 MR. ANDERSON: I believe so. Yes, Mr. Vittum.

12 THE COURT: All right.

13 BY MR. ANDERSON:

14 Q Mr. Giese, this bears your received stamp on it?

15 A Yes, it does.

16 Q What does that indicate?

17 A That's the date we received it at the division

18 office. My secretary has been instructed to date stamp
19 everything that comes into the office. There are deadlines
20 on advertising claims, etc., which must be matched up to
21 make sure we are within the given time of the program.

22 Q Was this memorandum, Defendants' Exhibit 24,
23 used by you or referred to by you at any meeting with your
24 people?

25 A I believe that was referred to at a meeting.

1 Whether it was the morning it was received, which was the
2 second it was date stamped, or whether it was subsequently
3 during that week, I don't recall.

4 Q And exactly what was done with regard to the
5 subject matter of Defendants' Exhibit 24 by you, Mr. Giese?

6 A I reviewed the content of the letter stating
7 the fact that K. C. Munchkin is not to be referred to
8 as anything other than K. C. Munchkin, and to make sure
9 that the regional managers involved had referred and had
10 covered this matter with their dealer organization. That
11 the only name that we would want it advertised as or
12 promoted as would be K. C. Munchkin.

13 Q At about this time, had you had any other communica-
14 tions with anyone in the Odyssey organization with respect
15 to K. C. Munchkin and its identification?

16 A Prior to this letter, there is what we refer to
17 as an infamous grapevine that comes out of the corporation,
18 and it indicated there would be some probable problems
19 related to the dealer organization referring to K. C. Munchkin
20 as something other than what it really is.

21 Q Do you know, to the best of your knowledge, did
22 your sales personnel in your organization carry the word
23 to your dealers with respect to identifying K. C. Munchkin
24 as K. C. Munchkin?

25 A They were instructed to do so, and I have due

1 course to believe that whenever they are given a directive
2 by me or my sales manager, that directive would be followed
3 through.

4 Q There was an instance, and I don't know
5 whether the instance with that Minnesota Fats ad was prior
6 to this letter or after this letter, where I gave specific
7 instructions to Mr. Slipbrac to review that with Mr. Minnesota
8 Fats. I believe the ad referred to it as a Pac-Man-type
9 game.

10 Q I will show you a document that has been marked
11 as Defendants' Exhibit 4 and ask you if that is the
12 Minnesota Fats ad that you were just referring to?

13 A I believe there was one ad that was prior to this,
14 but the ad was very similar.

15 Q This ad is dated November 13, 1981, is that
16 correct?

17 A That's correct.

18 Q I will show you an ad which has been marked as
19 Defendants' Exhibit 5 of Minnesota Fats from the Chicago
20 Tribune for Sunday, November 22, 1981.

21 THE COURT: Mr. Giese, will you keep that document
22 away from the microphone because it interferes with
23 the recording.

24 THE WITNESS: Okay.

25 THE COURT: The one that the court reporter uses

Giese - direct

1 in the courtroom. Fine.

2 Go ahead.

3 BY MR. ANDERSON:

4 Q Can you identify that ad as one you have seen
5 before?

6 A Yes, I have.

7 Q Now is this the other ad that you had in mind when
8 you mentioned the other ad?

9 A No, I believe there was one more and the wording
10 had been changed in the third ad. It went from "a Pac-Man-
11 type game" to "as challenging as Pac-Man."

12 Q Now what happened in your organization after you
13 became aware of these advertisements or any of the earliest
14 of these Minnesota Fats advertisements?

15 A Mr. Slipbrac was instructed to review it with
16 Minnesota Fats and go over the fact that this can be
17 referred to as only K. C. Munchkin. I did not know what
18 had happened at that particular time until earlier this week
19 I had asked Tom Slipbrac as to what really Minnesota Fats'
20 comment was coming back, and it was very noncommittal.

21 MR. VITTUM: Objection, your Honor. He is
22 testifying as to what somebody else told a man who
23 told him. It's hearsay.

24 THE COURT: It all depends, Mr. Vittum, what

25 it's offered for.

Giese - direct

1 Would you read the question and answer
2 for me, Ms. Arboit, please. Just read the question
3 and answer.

4 (Record read.)

5 THE COURT: The objection will be overruled.

6 Proceed.

7 MR. ANDERSON: Thank you, your Honor.

8 BY MR. ANDERSON:

9 Q Mr. Giese, I would like to show you a third
10 Minnesota Fats ad which I have just had marked as Defendants'
11 Exhibit 24.

12 MR. VITTUM: Excuse me. I think 24 is the
13 memorandum, sir.

14 MR. ANDERSON: You are right. 25. Thank you.

15 THE COURT: All right.

16 MR. ANDERSON: Mr. Vittum, I don't think -- we
17 have not provided you with copies of that ad. I
18 am not sure you have seen it.

19 BY MR. ANDERSON:

20 Q Mr. Giese, I show you Defendants' Exhibit 25 and
21 ask if that's the third ad that you referred to of Minnesota
22 Fats that makes some reference to "as challenging"?

23 A Yes, that is the third ad I was referring to.

24 Q So that the ads now that you have before you,
25 Defendants' Exhibits 4, 25 and 5 are the three ads that

1 you were referring to in your testimony? the mail. This
2 was in A That's correct.

3 Q After instructing Mr. Slipbrac to go back to
4 Minnesota Fats, did you receive any further communications
5 from the Odyssey organization in Knoxville?

6 A The letter announcing the fact that there had
7 been a lawsuit filed naming North American Phillips
8 Corporation and Park Magnavox as co-defendants. Then here.

9 That Q I will hand you Defendants' Exhibits -- a
10 document that's been marked Exhibit 26 dated November 20,
11 1981. Q Did Mr. Slipbrac have any other letters from Mr. Slipbrac

12 to make any further? Can you identify that letter? in order to

13 seek A Yes, ration?

14 Q Yes, would you now state what you have in your
15 hand as Defendants' Exhibit 26. Mr. Slipbrac did have the

16 letter, A It is a letter or mailing from N.A.P. Consumer
17 Electronics Corporation in Knoxville, Tennessee, to all
18 Odyssey dealers announcing the lawsuit with Atari, Midway,
19 naming North American Phillips and Park Magnavox.

20 Q Did you receive the letter, Defendants' Exhibit
21 26?

22 A Yes, that was received at my office on Monday,
23 the 23rd, if you will notice the date stamped, and I recall
24 that one very, very openly because we had the complete
25 sales force in again for that meeting and I excused myself

Giese - direct

1 for a long-distance phone call and went in the mail. This
2 was in the mail that morning.

3 Q And at that meeting, what, if anything, did you
4 do with respect to this letter and the subject matter
5 of this letter?

6 A This was reviewed with the entire Chicago sales
7 organization. My sales manager was in attendance at that
8 meeting, and we discussed the letter as it's written here.
9 That there was legal action pertaining to the use of
10 Pac-Man rather than K. C. Munchkin.

11 Q Did Mr. Slipbrac make or did you ask Mr. Slipbrac
12 to make any further efforts with Minnesota Fats in order to
13 seek their cooperation?

14 A No, at that particular time I was not asked to
15 get us any additional support. Mr. Slipbrac did have the
16 letter, and he was to carry that message to his organization
17 the same as we had at the first meeting.

18 Q I will hand you an exhibit which has been marked
19 during Mr. Staup's testimony as Defendants' Exhibit 23, a
20 page from the Chicago Sun-Times for Saturday, November 28,
21 1981.

22 A Have you seen that advertisement of Minnesota
23 Fats before?

24 A Yes, I have. It's a copy of the ad dated
25 November 28, Saturday, referring to the Odyssey game

1 with no reference to any cartridge at all in the ad.

2 Q Do you know what relationship, if any, the series
3 of ads has with your sales personnel to conform to the
4 instructions of the two letters, Defendants' Exhibits 24 and
5 26?

6 A No, I really don't. I would hope it was a direct
7 result of my conversation with them, but I cannot testify
8 to that.

9 Q With respect to the Minnesota Fats ad, Defendants'
10 Exhibit 23, in the center part of the page, can you state
11 what, if any, Odyssey cartridges are referred to?

12 A The ad refers to Quest for the Rings, Monkeyshines
13 and K. C. Munchkin which are our new Odyssey cartridges.

14 Q Can you describe what, if any, relationship
15 North American Phillips Consumer Electronics has with
16 Minnesota Fats, business relationship?

17 A Minnesota Fats is a franchise dealer of ours
18 in the North American Phillips organization. They are a
19 totally independent business, and we sell them Magnavox
20 products through the organization.

21 Q Are you able to control their advertising?

22 A No, the advertising is as an independent business-
23 man and we are not able to control it, per se. We are
24 in a position to authorize the advertising in advance for
25 an account that does have advertising funds coming or

1 does earn advertising funds. ~~at this time.~~

2 Q Do you have -- does Magnavox or Odyssey have
3 any ongoing co-op advertising relationship with Minnesota
4 Fats with respect to video game cartridges?

5 A There are particular buy-in programs, periodically.
6 One of the buy-in programs took place last June whereby a
7 given account agreed to take delivery of a certain amount
8 or quantity of products and for that purchase, they earned
9 additional advertising funds or earned advertising funds.

10 ~~Flagrant violation~~ Minnesota Fats did not live up to that
11 commitment of accepting delivery of the product, and there-
12 fore, he had no advertising dollars on that particular
13 purchase. ~~then go to the corporate counsel in Knoxville who~~

14 would Q With respect to the Minnesota Fats ad, Defendants'
15 Exhibits 4 and 5 and the one I most recently handed you.

16 A 23? ~~ANDERSON: Thank you. No further direct.~~

17 Q No, 25.

18 ~~Q~~ Can you state whether Magnavox or Odyssey
19 has provided any financial support for any of those ads?

20 A Those ads are laid out at this particular time.
21 They would have to be authorized in advance by Mr. Slipbrac.
22 The dealer would have to have a copy of his authorization
23 in his hand, and I would have to have a secondary copy in
24 my office. ~~MR. TITLES: Yes.~~

25 Q Was any of this done? ~~admitted into evidence.~~

Giese - direct

1 A I have no authorizations at this time.

2 Q If these three ads were submitted to you for
3 authorization of any co-op advertising support, would that
4 co-op advertising support be granted?

5 A No, they would not. Now there is a system, my
6 service merchandise, my service merchandising ad man would
7 get the advertising first. He would go through the ads.
8 We would take a look at the advertising that is there and
9 he would bring me up to date on any ads that may be very
10 flagrant violations of our co-op policies. Then I would
11 have the opportunity to go through those and if for some
12 reason my service administrator and myself missed the ad,
13 it would then go to the corporate counsel in Knoxville who
14 would review it for the same legal technicality I would
15 review it for. you familiar with the legal system?

16 MR. ANDERSON: Thank you. No further direct,
17 your Honor.

18 THE COURT: All right.

19 MR. ANDERSON: I would like to offer Exhibits
20 24, 25 and 26 into evidence at this time.

21 THE COURT: Any objection?

22 MR. VITTUM: No objection.

23 THE COURT: None.

24 MR. VITTUM: No.

25 THE COURT: They are admitted into evidence.

Giese - direct
- cross

(Whereupon said Defendants' Exhibits 24, 25
and 26 were admitted into evidence.)

CROSS EXAMINATION

BY MR. VITTUM:

Q Mr. Giese, when you received the October 27 memorandum from Mr. Hafner which your receipt stamped copy has been marked as Defendants' Exhibit 24, you understood at that time that the concern was about associating the Pac-Man name with the K. C. Munchkin cartridge, didn't you?

A That's correct.

BY MR. VITTUM: Even though the reference to Pac-Man as a trademark didn't actually appear in Defendants' Exhibit 24, the memorandum, is that right?

A That's correct.

Q Are you familiar with the local video outlet known as Showtime Video?

A Yes, I am.

Q Let me show you an advertisement from the Chicago Tribune, Friday, November 27, 1981, section 4, page 16.

This appears to be an advertisement for Showtime Video referring to the Odyssey system, the Odyssey cartridges and the K. C. Munchkin cartridge, and I quote: "The game as challenging as Pac-Man!"

You've seen that ad before?

A Yes, I have.

Giese - cross

1 MR. ANDERSON: It's in parentheses.

2 MR. VITTUM: There was an exclamation right
3 before the end of the parentheses.

4 BY MR. VITTUM:

5 Q Are you familiar with that ad, sir?

6 A Yes, I am.

7 THE COURT: What is that exhibit number?

8 MR. VITTUM: It's Exhibit No. 19, your Honor.

9 THE COURT: Plaintiffs' Exhibit 19.

10 MR. LAGOD: That's correct, your Honor.

11 BY MR. VITTUM:

12 Q I also will show you a document that I have
13 marked as Plaintiffs' Exhibit 18.

14 MR. VITTUM: That's 18, your Honor. I have an
15 explanation for this. It has a mailing label with
16 my name on it. It was waiting at my house when I
17 got home last Wednesday, and I apologize to the Court
18 because there is some handwritten notes on there.

19 THE COURT: Show it to Mr. Anderson. If they
20 have no objection, I don't have anything to say about
21 that. Let's see what Mr. Anderson has to say.

22 MR. VITTUM: I am simply going to say my
23 children wrote some notes on there for their Christmas
24 list.

25 THE COURT: They may not have any objection.

Giese - cross

1 If they do, we will listen to it.

2 MR. ANDERSON: The notes are apparently in red
3 and circled are some items.

4 THE COURT: If there is any objection to anything,
5 then we will discuss it. I suggest to you you find
6 a way to erase it and delete it. It's a very simple
7 thing to do, ordinarily. Maybe an eraser will take
8 care of it.
9 Otherwise, any kind of ink will take care
10 of anything that's been added to it.

11 MR. ANDERSON: I think we can live with the
12 red markings.

13 THE COURT: All right. Let's proceed now.

14 MR. VITTUM: I just want the Court to know the
15 red markings were not on it when it was received at my
16 house.

17 THE COURT: All right.

18 BY MR. VITTUM:

19 Q Now let me show you Plaintiffs' Exhibit 18 for
20 identification.

21 I ask you if that appears to be an
22 advertising piece for a retail chain known as Video, Etc.,
23 with outlets in Deerfield and Skokie?

24 A It appears to be that.

25 Q And it also lists the Odyssey II system, and it

1 lists the new games for the season and refers to the
2 K. C. Munchkin cartridge as, and I quote: "(a Pac-Man
3 game)".

4 THE COURT: Mr. Vittum.

5 MR. VITTUM: Yes.

6 THE COURT: I don't understand why is it necessary
7 to take up this time to ask Mr. Giese what that
8 document contains when I can look at it. You can
9 look at it. You don't have to take up time with the
10 witness about a document.

11 If you want to offer it in evidence, see if
12 there's any objection or if there is a stipulation to
13 admit it. I can look at it and see what it says.
14 Admit it. It isn't necessary to ask a witness these
15 questions.

16 MR. VITTUM: Thank you, your Honor. That was
17 my last question for the witness.

18 THE COURT: Well --

19 THE WITNESS: May I comment on that.

20 THE COURT: No. Wait and see if Mr. Anderson
21 has any questions of you.

22 Do you have any questions, Mr. Anderson?

23 MR. VITTUM: Let me just offer Plaintiffs'
24 Exhibits 18 and 19.

25 THE COURT: Any objection to Plaintiffs' Exhibits

18 and 19?

MR. ANDERSON: Your Honor, no objection to Plaintiffs' Exhibit 19. With respect to Plaintiffs' Exhibit 18, it's undated. I have no idea when it was prepared.

THE COURT: What is the purpose of offering --

MR. ANDERSON: And I do object to it.

THE COURT: -- this exhibit. 19 is not objected to. It's admitted into evidence.

(Whereupon said Plaintiffs' Exhibit 19 was admitted into evidence.)

THE COURT: What is the purpose for offering 18?

MR. VITTUM: 18 is another advertisement passed through the mails illustrating a retailer using a -- the name Pac-Man for this game.

THE COURT: The objection is overruled. It's merely to show that somebody else out there in the world of business has issued that document.

MR. VITTUM: Thank you.

THE COURT: It's only for that purpose.

MR. VITTUM: That's all.

THE COURT: All right. It may be admitted.

(Whereupon said Plaintiffs' Exhibit 18 was admitted into evidence.)

MR. VITTUM: No further questions, your Honor.

Giese - redirect

292

THE COURT: Anything else of Mr. Giese?

MR. ANDERSON: Yes.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q Mr. Giese, I would like you to look at these two exhibits, Plaintiffs; Plaintiffs' Exhibit 18 and Plaintiffs' Exhibit 19.

With respect to Plaintiffs' Exhibit 18, did you or as far as you know, anyone associated with Magnavox authorize the reference to Pac-Man in association with K. C. Munchkin as indicated on that exhibit?

A No, that was not authorized in advance. There is no Magnavox co-op on an item such as that, and I have had a conversation earlier with Video, Etc. on an ad that was also run in the Chicago paper referring to it as K. C.

Munchkin as a Pac-Man-type game. I personally picked up the phone and talked to them, and I told them that it was not to be advertised as anything other than a K. C. Munchkin cartridge.

Q I notice this ad was -- that's Defendants' -- Plaintiffs' Exhibit 18 indicates that the prices are good through 11-30-81. Do you know how far back this particular piece was prepared?

A No, I do not. This is the first I have seen this.

Giese - redirect

1 Q With respect to Plaintiffs' Exhibit 19, Showtime
2 Video, did Magnavox in any way authorize that ad?

3 A No, it was not authorized, and Showtime Video
4 is a subsidiary of Minnesota Fats.

5 Q Was any financial support authorized or any --

6 A None whatsoever.

7 MR. ANDERSON: No further redirect.

8 MR. VITTUM: Nothing, your Honor.

9 THE COURT: Thank you, Mr. Giese.

10 (Witness excused.)

11 THE COURT: You have another witness,
12 Mr. Anderson?

13 MR. ANDERSON: No, your Honor, I don't. I wonder,
14 though, if perhaps the best witnesses aren't the Pac-Man
15 and K. C. Munchkin games. Would you like --

16 THE COURT: Just wait one minute now. I just
17 want to know from the defendants if you have any other
18 witness to call.

19 MR. ANDERSON: No, your Honor.

20 THE COURT: All right. Then all the exhibits
21 offered by the defendants are in evidence. My notes show
22 that. All the exhibits down to and including Defendants'
23 Exhibit 26.

24 All right. Any rebuttal, Mr. Vittum?

25 MR. VITTUM: No, your Honor. No rebuttal.

1 THE COURT: All right. Then all the evidence is
2 in, is that correct?

3 MR. VITTUM: I believe so, your Honor.

4 MR. ANDERSON: Yes, your Honor.

5 THE COURT: All right. Now how much time are
6 you gentlemen going to require or desire to summarize this
7 matter for the Court, and before you answer my question, let
8 me tell you that it's now 12:20. I have another case which
9 was set a long time ago to begin at 2:00 o'clock. Tell me
10 how mucy time you need to argue this matter in summation.

11 First, Mr. Vittum.

12 MR. VITTUM: I would believe 15 to 20 minutes,
13 your Honor.

14 THE COURT: All right.

15 MR. ANDERSON: That should be satisfactory, your
16 Honor.

17 THE COURT: All right. Well, then I can hear
18 you in summation now.

19 What I am going to do is adjourn these
20 proceedings, and I am going to try to decide this matter
21 tomorrow morning between 9:00 and 10:00 o'clock in the
22 morning because I have to look over your proposed findings
23 of fact, and I will decide this motion for preliminary
24 injunction tomorrow morning. I am going to have to hope
25 that I can get the writing that I have to get done this

1 afternoon in order to do it. I will hear you in summation
2 now.

3
4 We will then adjourn these proceedings until
5 9:00 o'clock tomorrow morning and I have one or two questions
6 to ask of you. First, let me make one thing clear.

7 For the plaintiffs, Mr. Daniel W. Vittum, Jr.,
8 will be responsible for all the originals of the exhibits,
9 and Mr. Theodore W. Anderson will be responsible for all
10 the exhibits, that is, the originals of the defendants.

11 MR. ANDERSON: Thank you.

12 THE COURT: I have some of the copies here.

13 Mr. Grice, will you return these to
14 Mr. Anderson.

15 MR. VITTUM: Your Honor.

16 THE COURT: So each side will be responsible for
17 the original of the exhibits.

18 MR. VITTUM: With one exception. I think we both
19 marked the Pac-Man machine. Since it's Mr. Anderson's
20 machine --

21 THE COURT: I understand that. We know there is
22 a Pac-Man machine marked as Plaintiffs' Exhibit 16. It's
23 also Defendants' Exhibit 14, and there is that console
24 also. I think it has been marked by both sides, isn't that
25 correct?

MR. VITTUM: That's correct.

1 THE COURT: All right. Then the record shows
2 that.

3 Now with regard to these two -- these vital
4 exhibits in this proceeding, and that is the Pac-Man arcade
5 video game, which is Plaintiffs' Exhibit 16, Defendants'
6 Exhibit 14 and the console, did you want to do something
7 with those? You said something about it, Mr. Anderson.

8 MR. ANDERSON: Your Honor, on Wednesday you
9 indicated an interest in actually getting close to the games.

10 THE COURT: Let me tell you what I have done.
11 I have looked at -- I am looking now at the Odyssey console,
12 and that's what is referred to as the Odyssey 2.

13 MR. ANDERSON: Yes, your Honor.

14 THE COURT: Well, I am looking at it now, am I
15 not?

16 MR. ANDERSON: Yes, your Honor.

17 THE COURT: And I have also seen, I have seen the
18 Pac-Man game. It's been displayed a number of times, and
19 it's also Plaintiffs' Exhibit 4.

20 MR. ANDERSON: Yes, your Honor.

21 THE COURT: Except that Mr. Averett has said
22 something -- no, he spoke about the K. C. Munchkin rendering
23 of the K. C. Munchkin maze as being Atari's rendering.

24 MR. ANDERSON: That was in --

25 THE COURT: But I have seen the K. C. Munchkin

1 maze, and I am looking at it right now, and I have seen the
2 Pac-Man maze and one of the characteristics of these two
3 video games which is obvious is the Pac-Man arcade video
4 game only has one maze.

5 MR. ANDERSON: Yes, your Honor.

6 THE COURT: And the Odyssey 2, K. C. Munchkin
7 cartridge, when used in that console produces, as I was
8 told, seven.

9 MR. ANDERSON: Actually, I think, more than that,
10 your Honor.

11 THE COURT: How many more?

12 MR. ANDERSON: Well, there are, I believe, and
13 you might have to have Mr. Averett explain this but there
14 are different mazes on the programmable mode where the
15 owner can make any maze he wants. Then --

16 THE COURT: But one of them, in any event, one
17 of them is this one I am looking at now.

18 MR. ANDERSON: Yes, your Honor.

19 THE COURT: And I take it, this is the one that
20 the plaintiffs claim infringes upon Pac-Man's video game.

21 MR. ANDERSON: I won't speak for the plaintiff.

22 THE COURT: I assume that. I can hear you,
23 but I have looked at these two, and I have them right here.

24 Is there anything else?

25 MR. ANDERSON: No, I think we used in cross

1 examination of Mr. Moone, Plaintiffs' Exhibits 4 and 12
2 which we compared side by side.

3 THE COURT: Yes, I have it right here. I have
4 both of them right here, and it's Plaintiffs' Exhibit 12
5 that Mr. Averett suggested is not accurately the K. C.
6 Munchkin maze. The one that I am looking at.

7 MR. ANDERSON: I believe it was Plaintiffs'
8 Exhibit 6 Mr. Averett said was not accurate.

9 MR. VITTUM: It was the magazine advertisement.

10 MR. ANDERSON: The magazine advertisement, not
11 the --

12 THE COURT: The magazine advertisement which he
13 thought was more Atari's rendering than the actual maze,
14 as I am looking at it now.

15 MR. ANDERSON: Yes, your Honor.

16 THE COURT: All right. Let me find --

17 MR. VITTUM: Your Honor, did you want a copy
18 of Exhibit 6?

19 THE COURT: Well, I was looking to see if I had
20 it.

21 MR. VITTUM: I believe --

22 THE COURT: And I don't have it, for some reason.

23 MR. VITTUM: Here. It's not a marked copy,

24 but it is the --

25 THE COURT: All right. Is that an original?

MR. VITTUM: Yes.

THE COURT: Is that the original exhibit?

MR. VITTUM: No, it's an extra copy, your Honor.

THE COURT: It's an extra. I don't want you to give me any original exhibits.

MR. VITTUM: I understand that.

THE COURT: Mr. Grice, will you staple this together.

THE CLERK: Very well.

THE COURT: Now how do these things --

MR. ANDERSON: There is one column on the second page on the left side, your Honor, which goes -- no, on the other side, the left-hand column.

THE COURT: Oh, this right here.

MR. ANDERSON: It lists all of the games Odyssey offers.

THE COURT: Will you staple this.

THE CLERK: Yes.

THE COURT: This is Plaintiffs' Exhibit 6.

MR. VITTUM: Plaintiffs' Exhibit 6, your Honor,

yes.

THE COURT: All right. Let me ask a question of Mr. Vittum.

MR. VITTUM: Yes.

THE COURT: Which of these mazes in the Odyssey

1 console do the plaintiffs accuse as an infringing copy, or
2 to use your expression which I heard you use a number of
3 times here, which is so substantially similar as to show
4 copying?

5 MR. VITTUM: That is exactly correct, your Honor.

6 THE COURT: All right. I want to be sure we
7 understand we are using the same terms. Now which one of
8 these K. C. Munchkin mazes is accused by the plaintiffs as
9 infringing the Pac-Man maze?

10 MR. VITTUM: All right. It is the maze that I
11 have just generated by pressing the reset button and --

12 THE COURT: Mr. Anderson, will you state for
13 the record what is it Mr. Vittum is doing, so you will
14 agree.

15 MR. VITTUM: And I am now pressing the zero button
16 along the numbers, and it is the --

17 THE COURT: All right. The maze which now is
18 shown.

19 MR. VITTUM: That is correct, your Honor.

20 THE COURT: Let me ask another question. Is it
21 claimed by the plaintiffs that there are any other mazes in
22 that cartridge that infringes Pac-Man, that I have referred
23 to, and which is Plaintiffs' Exhibit 4?

24 MR. VITTUM: Yes, your Honor. We submit that
25 all of the mazes that are produced in this game represent

Vittum - closing

301

1 an infringement or are so similar as to demonstrate copying.
2 It is also our contention that this maze is the most
3 similar, and it is the one that has, at least in the Atari's
4 conceptual form, it is the version that has a period in
5 the advertising and in the instructional booklet.

6 THE COURT: All right.

7 MR. VITTUM: Will you hear us now in argument,
8 your Honor?

9 THE COURT: Yes.

10 MR. VITTUM: Thank you.

11 WHEREUPON THE FOLLOWING CLOSING ARGUMENT
12 WAS MADE ON BEHALF OF ATARI AND MIDWAY CORPORATION BY
13 MR. VITTUM AS FOLLOWS:

14 MR. VITTUM: May it please the Court.

15 THE COURT: You may proceed.

16 MR. VITTUM: Your Honor, plaintiffs submit that
17 we have established on the evidence all the elements
18 required for preliminary injunction for relief for copy-
19 right infringement, and for unfair competition and deceptive
20 practices. As to the copyright claim, the copyright
21 statute, 17 U.S.C., denotes the scope of protection.
22 Section 501 of the statute, and I have for the Court photo-
23 copies of the public law having the basic provisions
24 involved, and section 501 defines infringement.
25

1 What it says is that it is infringement to violate
2 any of the exclusive rights of copyright given to the
3 copyright owner in Sections 106 through 108 of the Copyright
4 Statute. For purposes of this hearing and this proceeding,
5 we need only look at Section 106 of the Code which, in its
6 terms, gives the copyright owner the right to produce the
7 copyrighted work in copies, the right to prepare derivative
8 work based on the copyrighted work, the right to distribute
9 copies and the right to display and perform in the case of
10 an audio/visual work, such as, this.

11 A showing of violation of any one of these rights
12 then represents infringement under the Copyright Statute.
13 Each are independent acts of infringement and can, independent-
14 ly, support the injunction that is here sought.

15 As the Court had several times pointed out, the
16 real question for determination here is the issue of copying.
17 The issue of the similarity of the audio/visual content of
18 the two games. This is especially true here where a validity
19 of the copyright is unchallenged for purposes of this hearing,
20 and it is also especially true here where the defendants
21 admit their prior awareness of the Pac-Man and hence, have
22 admitted access to the copyrighted work.

23 Cases have made clear that copying within the
24 meaning of the statute can be shown by proof of access and
25 substantial similarity. The cases go further and they

1 establish a relationship between the elements of access and
2 substantial similarity. Where no access is shown, an
3 extraordinary degree of similarity must be shown in order to
4 produce an inference that the access for copying took place,
5 but in a case such as this where awareness and access to the
6 copyrighted work is shown in the evidence, the proof of
7 similarity need not be as great as where access is not shown.

8 ~~obscured~~. Finally, from the case law standpoint, your Honor,
9 the cases make clear that the standard to be applied is one
10 of the ordinary observer. It is not the skilled, the
11 trained, the expert, and it is not the computer programmer.

12 It is not even the columnist who writes columns about arcade
13 games. It is the ordinary observer. The test is whether
14 the ordinary observer would find similarity. Whether to the
15 ordinary observer it would appear that the accused work has
16 been derived from the copyrighted work.

17 I would call to the Court's specific attention one
18 of the cases we cited in our memorandum. It's the Sid and
19 Marty Kroft case against McDonald Corporation at 562 F. 2d 1157.
20 That case is very instructive for purposes of this case
21 because that case involved a claim by the owners of the
22 copyright in a children's television program that their
23 copyright had been violated by the use by McDonald Corporation
24 and its advertising agency of the copyrighted work.

25 The case is interesting to this one because it

1 involves a change of medium. There the change from a televi-
2 sion program to an advertising format. Here we have a change
3 in medium from the arcade games to the home video games.

4 THE COURT: The case is also instructive because it was a case
5 where access was shown, indeed just as was the case here.
6 There was an inquiry to the copyright proprietor requesting
7 permission or a license, just as here, and no license was
8 obtained. The infringement took forward. Just as here,
9 the Court applied this inverse relationship in the quantum
10 of proof between similarity and access, and pointed out that
11 a lesser degree of similarity need only be shown there
12 because access was so clear, and finally, the case is important
13 because the Ninth Circuit Court of Appeals in that decision
14 declined to permit the defendant to dissect the copyrighted
15 work into individual characters and then to point out details
16 of clothing, colors and features, and then to argue that there
17 had been no violation of copyright.

18 THE COURT: The Court pointed out the impression of work as
19 a whole to the ordinary observer -- points, and pointing

20 THE COURT: Where do you say that case is cited? That

21 MR. VITTUM: It's cited in our memorandum of law, your
22 Honor.

23 THE COURT: All right.

24 MR. VITTUM: I have a copy of the decision here which
25 I will hand up to the Court. This is the highlighted version

1 of the case, your Honor.

2 MR. LAGOD: Your law clerk was provided with a copy
3 earlier today, your Honor.

4 THE COURT: Oh, yes, I have this.

5 MR. VITTUM: So we would submit the Sid and Marty Kroft
6 case answers many of the contentions that the defendant
7 has advanced in its effort to demonstrate noninfringement
8 of the K. C. Munchkin game, but as to the primary question
9 of similarity, it's not as the Court has noted. It's not a
10 question of law, it's a question of fact. It's a question
11 of observation of the games themselves, the audio/visual
12 presentation and their play.

13 The testimony of both sides, the witnesses has
14 emphasized the principle areas of similarity. The appearance,
15 the similarity in character, the similarity in play of the
16 game, the similarity in scoring and even a similarity in
17 strategy. Both sides' witnesses have noted that the games
18 both involve a central gobbler character who moves about
19 a maze capturing dots and scoring points, and avoiding
20 goblin monsters. Both sides' witnesses have noticed that
21 both games involve a concept of a special dot which, when
22 consumed by the gobbler, reverses, turns the tables and
23 permits the gobblers to contact the monsters and to score
24 additional bonus points.

25 Both sides' witnesses have pointed out the similar-
ities in scoring, this incremental scoring, and both sides'

1 witnesses have pointed out the similarities of the use
2 of a tunnel wraparound, unique to the Pac-Man and Munchkin
3 games.

4 Indeed, the defendants' expert, Mr. Kunkel, said
5 that K. C. Munchkin was, and I quote "obviously inspired by
6 Pac-Man."

7 Mr. Kunkel also noted that Pac-Man was, and again
8 I quote "undisputably the most popular coin-operated game."

9 Mr. Kunkel noted that there were only superficial slight
10 differences in the ghost characters in the two games, and
11 in listening to the sounds of the K. C. Munchkin game and
12 the Pac-Man game, he noted that the sounds were similar as
13 well.

14 Mr. Kunkel's principal area of difference dealt with
15 some rather sophisticated notions of strategy that a skilled
16 player would know, but that type of difference does not meet
17 the ordinary observer test of one looking at the games as a
18 whole, and of the two, you would form a conclusion as to the
19 similarity or dissimilarity.

20 Even more importantly, here we need not rely solely
21 on the self-evident similarity of the two games, your Honor.
22 Here we have North American Phillips' conduct to rely on as
23 well. North American Phillips, while the K. C. Munchkin game
24 was being developed, sought a license from Midway. North
25 American Phillips, after the development permitted the

1 K. C. Munchkin game, they instructed him to make changes to
2 make the characters more different so that the Pac-Man or
3 gobbler character was no longer yellow just as it is in the
4 Pac-Man game.

5 North American Phillips, your Honor, accepted the
6 problem that has occurred in the field at the retail level.
7 North American Phillips in a unique action, as testified
8 by Mr. Staup, circulated a warning to its Regional and District
9 Managers pointing out that there was an important potential
10 problem involving trademarks. They didn't even have to tell
11 the District people in that memorandum, Defendants' Exhibit 24,
12 they didn't even have to tell them that the problem was the
13 Pac-Man game. Mr. Giese knew it, and anybody who knows these
14 two games would know it.

15 North American Phillips anticipated exactly the
16 problem of similarity that has occurred here. Nor do we
17 need be limited to that showing because we have the evidence
18 that has occurred at retail. The game has been advertised
19 and sold. The K. C. Munchkin game has been advertised and
20 sold using the Pac-Man name. It's been referred to as the
21 Pac-Man game, just like Pac-Man, as challenging as Pac-Man
22 and one retailer said, to Mr. Gallo that it was Odyssey's
23 Pac-Man. All North American can say concerning that evidence
24 is that they are going to talk to the retailers and tell
25 them how important it is that that not happen. Well, that's

1 like fixing the crossing gate on a railroad after the accident
2 expression on the marching gobbler character, but that doesn't
3 mitigate from the similarity of that creature when the game
4 month goes about going after the date. That's the expression
5 of the game. That's the idea, and that's what's involved
6 here. This whole notion of idea versus expression which
7 I think this Court may recall the Eveready decision which
8 Mr. Anderson alluded to as frequently, your Honor, I think
9 came to this Court from the Court of Appeals after the deci-
10 sion on the trademark issued. The Court of Appeals in that
11 case had before it three separate items of confusion at the
12 retail trade by Judge Marshall who dismissed it, and the
13 decision which was reversed by the Court of Appeals.

14 The Court of Appeals in its decision pointed out
15 how important that kind of retail level confusion evidence
16 is. We would submit that the evidence shown here in Chicago,
17 and now in Los Angeles papers, is something that is totally
18 beyond the control of North American. It is a recognition of
19 similarity of the games. It is a violation of the plaintiffs'
20 rights, your Honor, and it is proof of the extreme importance
21 of preliminary relief. That matter is, I would submit, your
22 Honor, utterly out of control at the retail level, and there
23 isn't anything that North American can do.

24 As against this proof of similarity, as I mentioned
25 earlier, North American primarily seeks only to dissect the
game into little increments and point out that there are
bumps on the shoulders of the ghosts and there is a facial

1 expression on the munching gobbler character, but that doesn't
2 mitigate from the similarity of that creature when its open
3 mouth goes about going after the dots. That's the expression
4 of the game. That's the idea, and that's what's involved
5 here. This whole notion of idea versus expression which
6 Mr. Anderson alluded to so frequently, your Honor, I think
7 it is important that the Court put that in context.

8 of irreparable harm. That's true in any copyright case, as I argued
9 earlier. It would be true in a motion picture work. It would
10 be true in a stage play, but it's how that basic idea is
11 represented.

12 Now we had Mr. Averett explain in his testimony
13 what the original concept was, and that was simply a maze
14 chase game where the central character would score points.
15 Now that's a basic idea. Now how is that idea expressed?
16 Well, it's expressed in the Pac-Man game by the central
17 character who munches dots, who goes about avoiding ghosts
18 and goblins. It is expressed by the sequence with the
19 power pills where the reversal in roles occurs and the Pac-Man
20 character can score points by munching the goblins.

21 Now those are all the expressions of idea, your
22 Honor. That's not the idea, and those are the expressions
23 that all of the witnesses have found to be common between
24 Pac-Man and K. C. Munchkin. Your Honor, I would submit
25 that in terms of the likelihood of success aspect of a

1 preliminary injunction ruling, the presence of conceded
2 validity, the admitted access and the similarity shown
3 by the games themselves, the witness' testimony, North
4 American's conduct and the retail evidence show that ultimate
5 success on the copyright claim is not nearly likely, your
6 Honor, it's virtually certainty.

7 The remains for consideration are the questions
8 of irreparable harm to the plaintiffs from the conduct
9 of the defendant. There is direct evidence of harm to the
10 Plaintiff Atari. The witnesses from North American Phillips,
11 here today, your Honor, have made clear the considerable
12 economic importance of launching this game into the Christmas
13 market. Mr. Moone, when he testified, the senior executive
14 officer of Consumer Electronics for Atari, Mr. Moone made
15 clear his personal involvement had been required because of
16 the large customers' such as, Sears and K-Mart, who had
17 booked orders with Atari based on the assumption that Atari
18 has the exclusive Pac-Man home video game. Mr. Moone's
19 testimony makes clear that while no orders have yet been
20 cancelled, it's an absolute certainty that those orders will
21 be cancelled and that future orders will be refused if that
22 premise of exclusivity does not hold up. If the K. C.
23 Munchkin game is not enjoined, the damage is direct and
24 certain.

25 K. C. Munchkin has sought to preempt the home

1 video market for "that famous arcade game" that was
2 referred to in the Los Angeles Times. There is not any doubt
3 in anybody's mind what game was referred to. It's the
4 Pac-Man game. K. C. Munchkin has admittedly tried,
5 through its emphasis on new cartridges, such as K. C.
6 Munchkin, to maximize its sales on the Odyssey 2 cartridge
7 and the North American Phillips witnesses have indicated
8 that once somebody buys that Odyssey 2 console, that market
9 for cartridge sales is lost forever to Atari. In short,
10 K. C. Munchkin has attempted to appropriate the exclusivity
11 in Pac-Man which Atari, in good faith, negotiated for and
12 has agreed to pay dearly for.

13 If if there were no competition at all between
14 Atari and Odyssey, and ads that are before the Court show
15 them set up side by side in comparison, but even if there
16 was no competition, it is still important to protect by
17 injunctive relief the originality and creativity by copyright.
18 To give you an example, your Honor, even though
19 a motion picture is a different medium from a novel, the
20 author of a novel is still entitled to an injunction preventing
21 the use of his copyrighted work in a motion picture while
22 that work is popular. It is perhaps because of all these
23 reasons suggesting the importance of injunctive relief that
24 the case law, your Honor, says that in copyright cases,
25 irreparable injury is presumed.

Now in this case we don't have to rely on that presumption because the evidence demonstrates the direct harm on Atari and Midway of the loss of the exclusivity in this Pac-Man game. The most popular arcade game now around. It also has impact, as Mr. Paul testified, on the willingness of the creators to spend money to develop and license their creative works.

Finally, your Honor, as to the hardships, Atari has pointed out how it can be harmed by the loss of the right to introduce the genuine, the exclusive and the licensed Pac-Man home video game. As against this, we have Mr. Staup's testimony aggregating to a \$5,000,000 figure, but I would suggest that that figure is not the correct figure that the Court ought to look at. The Court should, first of all, look at the figure of \$900,000 which is the advertising commitment to K. C. Munchkin that, apparently, cannot be altered. Certainly, in terms of retail advertising, that can be changed very quickly. At least, they apparently persuaded Minnesota Fats to change his ads very quickly so that the remaining \$300,000 of retailer support ought to be devoted to other games.

Secondly, Odyssey does have other games. They have other new games. They featured these in their advertising in the spring and the summer. It has a total of 33 games available, not even counting K. C. Munchkin. It hardly harms them

1 to force them to simply emphasize and promote that wealth
2 of other games, software for its Odyssey 2 system so balanced
3 against that, relatively minor hardship, your Honor, we would
4 submit that the plaintiffs' loss of and for having the
5 preemption from the plaintiffs of this right to introduce
6 what the market demand is waiting for, the genuine Pac-Man
7 home video game, there's just no comparison.

8 In any case, I would cite to the Court one further
9 Seventh Circuit decision, the Helene Curtis case which we
10 also cite in our memorandum. In that case, the defendant
11 in a trademark case ought to avoid a preliminary injunction
12 by arguing that it committed substantial funds for advertising
13 and promotion of the accused product. The Court of Appeals
14 there noted that because of the deliberate conscious decision
15 that had been made by the defendant in that case, the hardship
16 that arose from the consequences of that deliberate and
17 conscious decision could not be used to justify denial of
18 a preliminary injunction. So, too, here.

19 If the Court will review the stipulations of facts
20 that we have entered into, the Court knows that the parties
21 have stipulated that the K. C. Munchkin decision was a
22 deliberate conscious decision. It was a decision taken
23 with knowledge of the Pac-Man game, with access to the
24 Pac-Man game and even in anticipation of litigation and
25 possible disputes with the owners of the Pac-Man trademark and

1 copyright.

2 So, your Honor, I would submit any harm or hardship
3 to the defendants falls into exactly that category that the
4 Court in the Helene Curtis case indicated should not be
5 given weight to. Judge, I would submit that there is hardly
6 a case imaginable in which the elements for preliminary
7 relief have been more clearly shown.

8 Your Honor, Validity is given. Access is shown. The similar-
9 ties speak for themselves, and the harm to the plaintiffs in
10 losing their exclusivity, in having the market for the
11 bonafide license that they have entered into preempted is
12 so much and so strong as to outweigh any consideration on
13 the defendants' side.

14 Your Honor, the plaintiffs urge entry of a preliminary
15 injunction. Thank you.

16 Your Honor, I don't think I entirely consumed my
17 time. I have a moment or two for rebuttal.

18 THE COURT: No, you said 15 minutes. I was going to
19 tell Mr. Anderson I may not be able to hear you today.
20 It's now five minutes to 1:00, and I have another matter here,
21 and I have a case to begin at 2:00 o'clock. I want some
22 time between now and 2:00 o'clock. I may not be able to hear
23 now.

24 MR. VITTUM: Your Honor, I apologize if I took longer
25 than I said.

1 THE COURT: You said 15 minutes, and we started about
2 12:30. It's now five minutes to 1:00.

3 MR. VITTUM: I thought I said 15 to 20 minutes, your
4 Honor, but I apologize in any case.

5 THE COURT: If Mr. Anderson takes the same amount of
6 time, I won't be able to hear this case now.

7 MR. ANDERSON: I had in mind about 15 or 20 minutes,
8 your Honor.

9 THE COURT: Now let's stop here because I don't think
10 I can do it. I am thinking now of asking you to come back
11 this afternoon. I have to start a case at 2:00 o'clock which
12 I set months ago, and remember that this case came in as
13 an emergency matter.

14 MR. ANDERSON: I suggest, your Honor --

15 THE COURT: I tried to accommodate the lawyers and
16 litigants in this case, but I have another matter which
17 I set months ago and I can't delay that trial beginning at
18 2:00 o'clock.

19 MR. ANDERSON: I would suggest we come back if you would
20 be available at all today.

21 THE COURT: Well, come back at 5:00 o'clock. I will
22 hear you the rest of the evening.

23 MR. ANDERSON: I promise to limit it to 20 minutes.

24 THE COURT: Let's adjourn these proceedings until 5:00
25 o'clock this afternoon.

1 MR. VITTUM: Thank you, your Honor.

2 THE COURT: All right.

3 (Whereupon an adjournment was taken
4 until 5:00 p.m. of the same afternoon.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 THE COURT: (The following further proceedings were
2 had and taken herein at 5:00 p.m.)

3 THE COURT: Mr. Anderson, you may proceed.

4 MR. ANDERSON: Thank you, your Honor.

5 THE COURT: All right.

6 MR. ANDERSON: We have put together a binder of the
7 cases that I will be making reference to and I would like to
8 hand up two copies to the Court if I may. I think it will
9 help to shorten my presentation a bit. And also, we have
10 highlighted the cases to indicate the points on which we will
11 primarily rely.

12 Counsel in his summation addresses his case in a
13 simplistic way, referring to similarity of games, while
14 similarity of games is not, in fact, the issue here but it
15 is --

16 THE COURT: Well I think, in fairness to what Mr. Vittum
17 is saying, Mr. Vittum is saying, as I understand, it isn't
18 similarity of games; it is substantial similarity as a test
19 of copying. I don't think he is saying that similarity --
20 that is not what he is saying.

21 MR. ANDERSON: Your Honor, the substantial similarity
22 which is the test is the substantial similarity of the
23 protectable material, not of the entire device -- the
24 protectable material is only an audio-visual display. It
25 is not a joy stick or maze.

THE COURT: The protecting material here, as I understand it -- now we haven't gotten to and I don't suppose we need to, in this motion -- and you said something to alert me that I wanted to ask about what was submitted to the copyright office with the copyright registration but I must assume that whatever was submitted, consisted of this Pac-Man maze. That is what is protected, as I understand it.

MR. ANDERSON: Your Honor, one of the shortcomings here is that what was submitted to the trademark, the copyright office, has not been displayed. I think there must be an assumption by all of us as to what was submitted. The copyright requirement is that a complete copy of the best edition be submitted to the copyright office. I will get to that momentarily with respect to what other Courts have suggested in that regard.

But here, the point is, the audio-visual display is all that can be protected by the copyright and the copyright statute, 17 USC 101 defines an audio-visual work as a work that consists of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes in which the work is embodied.

The audi-visual work does not include anything other

1 that that expression, as the term has been used here. And
2 the Supreme Court in Mazer vs. Stein, the first case bound
3 in the booklet, made it clear that there is a sharp distinction
4 between the expression that is protected by copyright and the
5 idea that is being expressed and at Page 217 of Mazer vs.
6 Stein, we have marked a quote that states:

7 "Unlike a patent, a copyright gives no
8 exclusive right to the art disclosed; protection is
9 given only to the expression of the idea -- not the
10 idea itself."

11 Now to try to see exactly what the Supreme Court
12 indicates by that, we look to the cases that have followed
13 it. We look to the new 1978 statute.

14 In Mazur vs. Stein at Page 218, the Court went on
15 to state:

16 "The copyright protects originality rather
17 than novelty or invention -- conferring only 'the sole
18 right of multiplying copies.'"

19 In Durham Industries vs. Tomy, the second case
20 that we have bound in our book, is a Second Circuit case,
21 1980 case that goes right to the point of games or dolls or
22 toys. There, the accused made a game that played exactly
23 the same. It had four levers to bounce a peanut or a golf
24 ball into particular positions and that is what the plaintiff
25 copyright owner had done.

But, the Court there, found that that was not copying that was taking anything that was protectable but said in that regard, at Page 913:

"It follows that where the protected work and the accused work express the same idea, the similarity that inevitably stems solely from the commonality of the subject matter is not proof of unlawful copying."

And quoting a case, the Court went on:

"There is another, equally important Copyright Act, limitation on the scope of copyright protection that must be kept in mind in assessing substantial similarity. Just as copyright protection extends to expression but not ideas, copyright protection extends only to the artistic aspects, but not the mechanical or utilitarian features, of a protected work."

In this case, of course what counsel is arguing is protected is not the aesthetic but the play of the game, the strategy.

In the Durham case the Second Circuit went on at Page 915, after describing the games and the fact that all that the accused did, what the accused did was changed the characters and the colors and states:

"The feature of Tomy's games that have been copied by Durham relates to the mechanical, utilitarian

aspects of the toys."

The Court goes on at Page 915:

"Tomy has simply failed to specify any 'sculptural features' or aesthetic elements of either game which could be identified separately from and exist independently of the utilitarian aspect of the article."

In that case they were relying on, these were three dimensional characters in color and they were relying on sculptural, rather than the audio-visual section/Copyright Act, but the law is exactly the same in both cases.

The Court went on in describing the copyright and the accused products and stated:

"That the idea behind each toy is the same is evident from a viewing of the toys, and the inference that Durham conceived of the idea for its doll only after viewing Tomy's toy is not an unreasonable one."

This included the dolls as well as the games. And the Court went on to specifically state:

"The most distinctive feature of the three Tomy dolls is their ability to walk or crawl, but it is clear from our discussion of the art/utility distinction that Durham is free to copy not only the idea of walking or crawling dolls, but the mechanism that makes such locomotion possible as well."

Your Honor, even the case that counsel has relied upon, the Sid and Marty Kroft television case which we didn't put in our booklet there, involved a TV commercial where

MacDonald's was charged with infringing for a particular dress and particular antics of the characters and the Court did find infringement, but the Court made the important distinction in that case, too, as stated at Page 1164:

"But there also must be substantial similarity, not of the general ideas but of the expressions of those ideas as well."

And they go on to discuss that specific point.

Now with respect to the statute, the statute defines an audio-visual work as I have just pointed out in the definition in 101, but the statute, in Section 102, goes on to specifically point out what is excluded, what cannot be protected by a copyright and of course that is equally important, more important perhaps to the issues in this case. Section 102(b) of the copyright statute specifically precludes the assertions that are being made here today and it reads:

"In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery regardless of the form in which it is described, explained, illustrated or embodied in

the work."

The statute is unequivocal. The cases fully support the fact that ideas, concepts, methods of operation cannot be protected.

In this case the game, of course, is being asserted as an audio-visual work and the cases in that area are equally instructive. I mentioned this in my opening. And the plaintiffs here rely on the Drikschneider case and the Stern case but in those cases it didn't result in preliminary injunctions but in Drikschneider the Court said:

"For all practical purposes, the games are identical."

Precisely it says:

"Mighty Mouse and the plaintiffs Pac-Man games were both, for all practical purposes, identical."

Exactly the same thing was true in Stern. The Court said the accused game and the copyrighted game were identical. That presents a totally different question than we have here today. That is the knock-up that counsel referred to in his opening remarks. That is not what we have here in any sense of the word.

The most that can be asserted is the use of an idea or a concept.

Another case that the plaintiffs rely upon is the case involving Krukenberg, Larry Krukenberg -- Midway Manufacturing Company vs. Larry Krukenberg, decided July 8, 1981 in

1 the Middle District of Florida. There Judge Young again
2 faced a product that was accused and he said at Page 5 of
3 the ruling which is bound in your book, your Honor, with
4 respect to these games:

5 "Now, I noted at the beginning that the
6 parameters of the copyright is not clear. In the
7 International Trade case, as I recall it, the
8 Commission held that there was a copyright only in
9 the attract mode and in the first instant of the play
10 mode.

11 There is some question whether or not anything
12 beyond that would be covered by the copyright. It is
13 also questionable as to how much the copyright would
14 protect copying of similar types of boards and of
15 mode of operation."

16 The Court goes on at some length and states:

17 "Because of the difficulty at this point
18 in resolving those issues, I limit the injunction to
19 the exact copying of those three electronic games,
20 the Galaxian, Rally-X, and Pac-Man, as has been done
21 in the exhibits which were demonstrated here before me.

22 When I say the exact copying, the changing
23 of the name Pac-Man to Rac-Man still comes within
24 exact copying. But I can't go beyond that."

25 These are the cases on which the plaintiffs would

1 like to rely here and I submit, that much more to the point
2 are the other two Midway cases that I mentioned during the
3 opening statement and that is, for one, Judge Decker's
4 decision in the Artic case, Pitway Manufacturing v. Artic
5 decided June 2, 1981.

6 THE COURT: By the way, what happened in that case? He
7 only denied the motion for summary judgment, didn't he?

8 MR. ANDERSON: Yes, your Honor, that's correct.

9 THE COURT: What happened after that?

10 MR. ANDERSON: I do not know the present status of that
11 case.

12 MR. VITTUM: Would the Court like to have that informa-
13 tion?

14 THE COURT: Just out of curiosity, what happened after
15 that?

16 MR. VITTUM: The matter is now pending before Judge
17 Decker on the fully briefed and submitted motion for preliminary
18 injunction by the plaintiff, Midway.

19 THE COURT: All right.

20 MR. ANDERSON: Judge Decker there said:

21 "put another way, plaintiff has apparently
22 attempted to copyright the audio and visual expressions
23 of its game. Thus, for example, it may have copyrighted
24 the shape of the aliens, what they look like and how
25 they move. Certain other aspects of the game, of course,

cannot be copyrighted. For instance, plaintiff cannot copyright the idea of seeing aliens in outer space and having them swoop down on a flagship."

In a similar vein, in the Universal case that I mentioned in opening, Midway Manufacturing vs. Universal Company, Limited, the Central District of California, decided July 24, 1980, Judge Waters in California was faced with a case which did not involve slavish copying of the type that I referred to earlier.

There, Judge Waters stated, and this was with respect to two other Midway games or the game Galaxian, Judge Waters said:

"Cosmic Alien and Galaxian have the same general elements; each game features a display of aliens which move in formation and drop missiles aimed at a ship controlled by the player. Each game also features aliens which break out of the formation and invert and swoop down to attack the player's ship. Both games features a star pattern background.

While the formations taken by the figures in each game are similar, the shapes and the colors displayed in each game are somewhat different.

Defendant and counterclaimant have produced evidence which tends to show that Cosmic Alien was the product of independent creation."

1 The Court went on and this is all in the bound
2 book: subject to copyright protection.

3 The "Counterclaimant has raised serious questions
4 on the merits of plaintiff's copyright claim which are
5 a fair ground for litigation. Many of the elements of
6 Galaxian for which plaintiff seeks copyright protection
7 are general principles of the game and are therefore
8 unprotectable. Plaintiff's copyrights are not infringed
9 simply because Cosmic Alien is set in outer space and
10 has aliens which swoop to attack the player's ship."

11 Your Honor, therein, I think, succinctly is stated
12 the statutory specific exclusions of any claim to an idea,
13 a procedure, a process, a system, a method of operation, a
14 concept, a principle or a discovery.

15 The cases have applied that specifically to games
16 of the type that we are involved with here and I think
17 clearly there is little likelihood of success by the plaintiffs
18 when this case goes to trial and perhaps I think I would
19 submit that the likelihood is very much the other way.

20 Now with respect to the similarities and the differ-
21 ences, I think the differences between the two games and
22 the two audio-visual displays involved here are very apparent.
23 You have heard great testimony on them, extensive testimony.
24 The similarities that counsel mentions are similarities,
25 similarities in concept. He mentioned the strategy; strictly

1 a concept, strictly a method of operation. Strategy of play
2 is not subject to copyright protection. method of operation.

3 The concept of a special dot is one that specifically
4 was mentioned in the summation. The concept of a special
5 dot in K. C. Munchkin is a very different, even a different
6 concept, let alone a different expression, a concept of a
7 moving dot, in contrast to a fixed pattern of equally spaced
8 dots. of the witnesses that there has been confusion. There

9 The concept of a gobbler chasing dots was mentioned
10 by counsel. That, of course, is part of what has been
11 referred to in the other cases as what is available, which
12 is not protectable material. has involved clearly recognized

13 And then he mentioned incremental scoring. The
14 scoring is again different but even if it weren't, the
15 audio-visual display has nothing to do with incremental
16 scoring and certainly incremental scoring cannot be protected
17 by a copyright on an audio-visual display.

18 Of course the sounds are completely different.
19 The only other similarity that was mentioned in the summation
20 was the wraparound of the Munchkin or of the Pac-Man which
21 means going out one side and disappearing and theoretically
22 going around the back in the wraparound mode and coming in
23 on the other side. And of course every witness indicated
24 that wraparound had been extremely common and the use of the
25 buzz word or the term "tunnel" is merely because in a maze,

1 it is that simple. That, again, is a function of the game,
2 it is a part of a concept, part of the method of operation.
3 It is not a part of the audio-visual display that is proper
4 subject matter for protection under the copyright laws.

5 Now with respect to the subject of confusion which
6 was addressed by counsel in his summation, there has not been
7 a single instance of confusion. There is no real suggestion
8 by any of the witnesses that there has been confusion. There
9 has been no unfair competition. I think it is clear that
10 to the contrary, there has been a very sincere effort to
11 avoid any possible confusion or unfair competition and the
12 record here shows that everyone involved clearly recognized
13 that Pac-Man was^a game that would be available from Atari or
14 was a game that Midway had in an arcade and that K. C. Munchkin
15 was a game that was available from Odyssey. There isn't a
16 scintilla of evidence of any effort of palming off. The
17 record, of course, is just to the contrary.

18 The people involved are knowledgeable. The gentlemen
19 who did the shopping, Mr. Gallo, testified that when you go
20 into the store, the Atari cartridges are in one rack down
21 one row and the Odyssey cartridges are in another rack down
22 another row.

23 The ads, even the ads that plaintiff would make
24 much of make it clear, in the ones that Minnesota Fats ran,
25 it plays like Pac-Man. This is not palming off. This is not

1 deception. This was an Odyssey cartridge for use in an
2 Odyssey console and everyone involved has made that clear
3 and that is the very antithesis of deception, the very
4 antithesis of unfair competition.

5 Finally, with respect to the question of irreparable
6 injury, your Honor, there has been no showing that Midway or
7 Atari will be injured by the continued sale of K. C. Munchkin,
8 of a cartridge for use in the Odyssey 2 consoles.

9 Counsel argues:

10 And "It is an absolute certainty that orders will
11 be cancelled."

12 The testimony was to the contrary. As much as I
13 asked Mr. Moone about that, he didn't ever suggest even that
14 a customer said he might cancel. He said they asked about
15 the exclusive rights. He never suggested that there was a
16 risk of any cancellation of orders or that any customer
17 indicated he might cancel orders. That argument is totally
18 unsupported by the evidence.

19 Counsel also argues that irreparable injury is to
20 be presumed and I submit, your Honor, that that is not correct
21 in copyright cases of this kind and that is for two reasons:
22 One, I question the likelihood of success. I believe it is
23 just the contrary, and I submit that. But also, that particular
24 doctrine is referred to the normal copyright case and I submit
25 this is not the normal copyright case. It is a very different

1 situation and it is not a book or a motion picture film. It
2 is a new concept of copyright protection and I submit that
3 this case should be put forward for trial at the earliest
4 possible time.

5 On the balance of hardship, Mr. Staup made it very
6 clear how Odyssey and his company would suffer in very real
7 dollars in specific figures and he was unequivocal in that.
8 Mr. Moone merely speculated about what might happen. He gave
9 no figures. He gave no specific evidence.

10 And even with respect to the presence of an Atari
11 cartridge on the market, there apparently is no plan to
12 bring out an Atari cartridge before next year, sometime in
13 the spring, and I submit that any claim of irreparable injury
14 or damage at this time is misplaced and can't be supported.

15 I submit, your Honor, that this motion should be
16 denied.

17 And I thank you.

18 MR. VITTUM: Your Honor, I will try to be very brief.

19 First of all, to respond to the Court's question
20 about what was submitted to the copyright office, what was
21 submitted to the copyright office was a video tape of the
22 play of the Pac-Man game. The reason we did not submit that
23 in evidence is that we obtained an agreement and a stipulation
24 of facts, number two of which is that the audio-visual work
25 covered by the copyright in suit is a series of images which

1 which appear on the television screen of Midway's Pac-Man
2 coin-operated video game.

3 THE COURT: Which consists of the maze.

4 MR. VITTUM: It consists of the maze, your Honor, but
5 not only of the maze. It is the sequence -- That's all

6 THE COURT: I understand that. But what you see when
7 you look at Pac-Man, you see the maze and then you see all
8 the rest of it and that is what you must submit because there
9 is nothing else to submit. There is no other expression in
10 Pac-Man.

11 MR. VITTUM: That's right, your Honor.

12 THE COURT: Than that.

13 MR. VITTUM: The only thing I would say is, it is not
14 the maze at one point in time.

15 THE COURT: Well, I know that.

16 MR. VITTUM: It is the sequence of things over time.

17 THE COURT: I know that. I know that.

18 MR. VITTUM: All right. Then the Court is absolutely
19 correct. That is correct.

20 THE COURT: One of the difficulties in this case and
21 I suppose you gentlemen who litigate these cases will cope
22 with this difficulty, is the complexity of this form of
23 expression known as audio-visual games. I went back to look
24 again at 102 and I couldn't help but think that what copy-
25 right protects ^{is} expression, without regard to form or medium.

1 The 1976 amendment to the Copyright Act simply is
2 coping with the advances in technology that create these
3 many forms of expression. When the copyright law was first
4 enacted in 1790, all they were thinking about was poems
5 and prose and what came out of a printing press. That's all
6 they were thinking about.

7 Since then, there have been all these technological
8 changes and this new phenomenon of video games which is a
9 contemporary technological phenomenon, lends a complexity to
10 this whole idea of expression. But the expression which is
11 protected by copyright is what you see in that screen from
12 the beginning to the end of the play. That is the expression.

13 MR. VITTUM: That's right, your Honor.

14 THE COURT: And so the question here is whether or not
15 there has been a copying of that expression.

16 MR. VITTUM: That's right, your Honor. And one has to
17 use the traditional notions of access and copying and similarity
18 and we tried to do that, and to point out to the Court how
19 these traditional tests that have evolved in other cases
20 apply in cases just such as this.

21 And so I would respond to the arguments that counsel
22 advances concerning the differences between idea and concept
23 on the one hand, and expression on the other hand, simply by
24 noting that the defendants' own witness, Mr. Averett, described
25 what the basic idea of the K. C. Munchkin game was, when he

referred to it as a maze chase game. If that is the basic idea, there are a large variety of forms in which that idea can be expressed. To take one extreme, one can take Mr. Averett's own Take the Money and Run game where he has characters battling computer characters to score points for money.

Another approach, one that was taken by the author or originator of the Pac-Man game was to express that idea in terms of a game having a maze with dots and a gobbler character with a mouth which goes around the maze consuming the dots, introducing the sequence of events or scenes where the reversal between the chasing ghosts or gobblers and Pac-Man, the munching character that occurs -- all of those, your Honor, we would submit are simply like successive scenes out of a motion picture and the test of infringement involving a motion picture involve determination of similarity in characters and scenes and sequence of events.

So we would submit that those kinds of traditional notions are exactly the kind of analysis the Court can use in making the determination that is necessary in applying the law to these new technological advances.

So we would submit that it is not so simple a matter as saying, as counsel has suggested, that rules that have been established in other cases or are normal cases, that somehow this is an abnormal case and should not be treated the same.

1 I don't think that is true.

2 The same philosophy, indeed, the same Constitutional
3 mandate for protection of creativity ought to apply here just
4 as it does in the case of a motion picture or in the case of
5 a book.

6 So, we would submit that this kind of subject
7 matter and the expression of it in the manner that we have
8 shown with the Pac-Man game in what we submit to be a very
9 similar expression in the form of the K. C. Munchkin game,
10 can be analyzed under those traditional principles and that

11 when those traditional principles are applied, a finding
12 of infringement is very highly likely in this circumstance.

13 Working from the same analogy to a motion picture,
14 your Honor, we would point out that the cases have shown
15 that for an infringement of a motion picture, for example --
16 the danger, Mr. Vittum, the danger of trying

17 THE COURT: The danger, Mr. Vittum, the danger of trying
18 to use that analogy is that a motion picture expresses -- in
19 the totality of the scenes of a motion picture is an expres-
20 sion of a story. It tells a plot and the whole thing is
21 veiled in a series of audio-visual conceptions and it tells
22 a story. A motion picture tells a story, which is the thing
23 that the copyright protects. It is the expression manifested
24 or made in a series of pictures of a motion picture and that
25 is what the copyright protects.

I don't mind telling you that I find using that to

come down to these video games here a very difficult step to take and I want you to know that this is not the first time that I have grappled with this subject, that is, the subject of copyrights and expression protected by a copyright. When you get to applying it to this arcade game here, it is a different process.

But go ahead and finish this because I want to conclude this. It is almost 6:00 o'clock.

MR. VITTUM: Surely. Just one or two more comments, your Honor.

As your Honor knows, you are not the only Judge that has been forced to grapple with this problem and there has been extensive discussion of the issues that raise exactly the issues the Court has raised in the Drikschneider and Stern cases which are important recent and very thorough analytical decisions that discuss the whole question.

THE COURT: Well, but Mr. Anderson points out -- I have looked at both cases during the time that I have had. When one can say that the two games are identical, you know, it seems to me the problem is easy. The problem of determining copyright infringement, when they are identical, then it seems to me the problem is easy, that is visually identical. Those cases, one of them, I think as you say, is an analytical decision. But there, the Judge had a case which he could look at and say, "These are the same, these are identical." And so

being identical, it is not difficult to see that there was copying.

MR. VITTUM: Your Honor --

THE COURT: I will look at it when you have finished here.

MR. VITTUM: Let me just say that in respect of this very same copyright that is here in issue, copyright covering the audio-visual work in the Pac-Man game, it has been extensively litigated. There has been no decision adverse to the validity of that copyright. There has been no decision

adverse to the scope of that copyright, your Honor, and there has been no decision denying preliminary injunctive relief.

THE COURT: Well, but Mr. Vittum, wait a minute now. What you are telling me has nothing to do with the issues I am faced with here.

Here in this case there is no dispute about the validity of the copyright.

MR. VITTUM: That's right.

THE COURT: For the purpose of this motion, the validity of the copyright is not at issue. The question is simply infringement, has it been infringed? The cases you are talking about didn't involve these two, that is, didn't involve this accused game.

MR. VITTUM: That's right.

THE COURT: But that is an entirely different matter.

those cases aren't helpful to me. I am proceeding on the assumption that every step necessary was taken in this copyright registration and the presumption of validity prevails. There is no attempt to rebut that presumption here.

So, the fact that the Pac-Man copyright has never been declared invalid, which is probably a more safe statement to make -- isn't it?

MR. VITTUM: That's right.

THE COURT: As I understand it, there is no case that has held that the Pac-Man copyright is invalid.

MR. VITTUM: That is not true, your Honor. It was held valid in the Drikschneider case by the District in Nebraska. Validity was challenged in that case and it was adjudicated favorably to the copyright.

THE COURT: In the final judgment?

MR. VITTUM: It is on a preliminary injunction, your

Honor.

THE COURT: All right. Wait a minute now. That is a different matter now. Just because the injunction was granted-- but there wasn't a determination of validity there, was there?

MR. VITTUM: There was a determination of the issue of validity as it bore on the likelihood of success.

THE COURT: All right. But as I told you, within the

realm of possibility, when the case went to trial -- the case

hasn't gone to trial on the merits, is that right?

MR. VITTUM: That is correct.

THE COURT: Well, we have to wait. We have to wait. We don't know what may happen between now and the time final judgment is entered in that case. We don't know. It would be different if there was a declaratory judgment that the Pac-Man copyright was valid, and I suppose it could only be valid in the context of the suit involving some accused game, I suppose.

All right.

MR. VITTUM: I would only suggest to the Court that in grappling with the question of copying, on the exact facts of this case, that the Court should bear in mind both its own observations of the similarities between the games, the characters, the audio-visual display, plus the testimony of the witnesses which the Court has heard at great length and which I do not propose to review again, and on the basis of that evidence, we would submit there is a substantial similarity under the law and that in applying the analytical framework given you by the other cases, that success is likely and that infringement has been shown.

Thank you, your Honor.

THE COURT: All right.

MR. ANDERSON: Your Honor, could I make just one factual point that I think won't be disputed?

1 It was suggested that the complete copy of the
2 best edition filed in the copyright office showed the play.
3 I was given what I understand was a copy. It has the attract
4 mode, a one-player sequence and a two-player sequence --
5 if I understand what you game me, Counsel, is that correct?

6 MR. VITTUM: I believe that is correct.

7 MR. COHEN: Your Honor, I represent Midway and we have
8 litigated this matter in many jurisdictions. Because we
9 have a stipulation here that the copyright is valid for the
10 purposes of this hearing and that what is protected is the
11 audio-visual work, what is on that video tape really has
12 nothing to do with what is before the Court and if we were
13 going to litigate that, we would put in what the copyright
14 office considered the video tape to be.

15 THE COURT: But I assume you did, in this case, what
16 every registrant of a copyright does.

17 MR. VITTUM: Surely. That is correct.

18 THE COURT: But there is nothing easier in the world
19 that I know of than getting a copyright. I can't think of
20 anything easier because I have had things copyrighted. I
21 have obtained copyrights, some of my writings. All I did
22 was take the particular thing, attached it to that form
23 and it took me two minutes to type it, send it to Washington
24 and I got back my copyright registration. I assume that is
25 what you did. You took a cartridge, I assume from what

Mr. Vittum tells me, you took a cartridge of the entire Pac-Man game. I assume that. Or maybe I am assuming too much.

MR. COHEN: Your Honor, what was done was the video tape was made of the attract mode and of the play of the Pac-Man game and the video tape which is a small thing, it was submitted to the Copyright Office as a deposit because the Copyright Office doesn't want anyone to wheel in a great big machine.

THE COURT: I understand that. My guess is that you are going to have trouble in the future even with the cartridges because there will be so many of them they are going to have to find a way to minimize that kind of storage problem.

I don't suppose it makes any difference for the purpose of this motion what you submitted to the Copyright Office. You have a copyright registration. You have a number. There is a presumption of validity and there is no issue raised about the validity of the copyright.

MR. VITTUM: That's right.

THE COURT: So it really doesn't make any difference.

MR. VITTUM: That's right. Thank you, your Honor.

THE COURT: All right. Now I had said that I was going to put this over until tomorrow morning at 9:00 o'clock and I will be very candid with you, I am having second thoughts about it. I would rather put it over until Wednesday morning at 9:00 o'clock because I have another trial going on and it's now nearly 6:00 o'clock and I don't know how much of this

material you have been handing to me as fast as you can come back from your offices -- and this pile gets higher and higher and I have to read this material and go over my notes and be prepared to make the findings of fact and reach conclusions of law.

I am going to put this over until Wednesday morning at 9:00 o'clock so it will give me just a few more hours to go over this material.

MR. VITTUM: Thank you, your Honor.

THE COURT: Wednesday morning at 9:00 o'clock.

MR. ANDERSON: Thank you, Judge, and may I express our appreciation for your taking the time to hear us at great length.

THE COURT: All right. You are welcome.

MR. LAGOD: May I ask the indulgence of the Court,--may we leave these materials here until tomorrow morning when our staff will come over the first thing in the morning to pick them up?

THE COURT: Yes, surely.

MR. VITTUM: Would the Court like to have the materials until Wednesday?

THE COURT: No, no. Thank you.

(Thereupon an adjournment was taken to Wednesday, December 2, 1981 at the hour of 9:00 o'clock a.m.)